APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-88

UNITED STATES OF AMERICA,
Petitioner,

—v.—

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 9, 1978
CERTIORARI GRANTED OCTOBER 9, 1978

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-88

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Page
Relevant docket entries	1
Selections from the transcript of the hearing on the motions to suppress	2
Selections from the trial transcript	8
Order granting certiorari	86

RELEVANT DOCKET ENTRIES

1. 8/14/70—Indictment, filed.

* * * *

10. 12/10/70—MOT. TO SUPPRESS EVIDENCE, filed by Deft. EDWARDS.

* * * *

21. 1/12/71—ORDER J. Hogan—indicating Defts. will be permitted to inspect scientific tests,—Overruling Motion of Deft. LIVESAY as to Identity Passing on Motion of EDWARDS as to Identification,—Finding Probable cause in arrest of 3 defendants,—Overruling Motion of LIVESAY to property,—Sustaining Motion of LIVESAY as to suppression of evidence taken from Plymouth.—Issued counsel.

* * * *

35. 9/30/71—Verdict, as to deft, EDWARDS filed; finding of Guilty, by Jury.

* * * *

SELECTIONS FROM THE TRANSCRIPT OF THE HEARING ON THE MOTIONS TO SUPPRESS

• • • •

[101] given Mr. McCroom a certified copy of the search warrant. I would assume he would want that made part of the evidence.

MR. McCROOM: Very definitely.

MR. NADEL: Again, I would have no objection. I would stipulate that. The only other thing that I would have on behalf of the government (conferring with Mr. Smith)—

Are you willing to stipulate it as part of the evidence?

MR. McCROOM: Yes.

MR. NADEL: Judge, by stipulation this certified copy of a search warrant is hereby made part of the evidence.

MR. McCROOM: Which includes the affidavit on which that warrant is issued?

MR. NADEL: Yes. As to time stamp and everything else (examining), at 1:30—the search warrant will speak for itself, but it does have a time stamp on it, Judge.

Judge, the only other thing that I have and perhaps counsel could stipulate this—it's up to them. As far as the government, we have one other witness to call and that witness would testify that he is the custodian of—Well, excuse me. We have

• • • •

Toller—Direct

[155] A. A short time later I directed that the car be impounded.

Q. I see. You say it was in the early morning hours of June 1st that you first saw it?

A. That I actually first saw the car, yes.

Q. Yes. Was there anyone in it at the time?

A. No, sir.

Q. Was there anyone with the automobile?

A. Sir?

Q. Was there anyone with the automobile? It was just sitting on the street in other words?

A. Well, I am trying to remember if there was somebody there. I couldn't swear that there was right at the time, except myself.

Q. The car was open, was it?

A. I really can't say.

Q. Did you make an inspection of it at that time?

A. No, sir; I did not.

Q. In other words, this was just a car about which you had information sitting on the street?

A. It was a car which we had a complaint on sitting on the street.

Q. Was it unattended, if you recall, at the time you first came to it?

A. I just said I don't remember.

[156] Q. And approximately what time was this?

A. I said in the early morning hours. I am not real sure of the time.

Q. That would have been in the nature of 1:00 o'clock or 2:00 o'clock?

A. I really can't testify to the time, sir. I don't remember.

Q. Well, I am only trying to see whether or not it was close to 10:00 o'clock or close to 1:00 o'clock. When you say "early morning," I don't know what that means. To the best that you can recall.

A. It was approximately midnight, shortly after midnight.

Q. And you next saw it where?

A. In back of the Police Department in the City of Lebanon.

Q. How did it get there?

A. By wrecker.

Q. Were you there?

A. When the car was dropped?

Q. When it was picked up.

A. No, sir; I was not.

Q. What time did it get to the City Police Department?

A. Once again, I'd have to say the early [157] morning hours. I have no specific time.

Q. Did you yourself at that time make an inspection to see whether the car was open or locked or anything?

A. No, sir. The first contact I had with that vehicle was after I obtained a search warrant.

Q. I see. In order to obtain that search warrant you filed a particular affidavit for a search warrant; is that right, sir?

A. Yes, sir; that is correct.

Q. I show you what's been introduced as Plaintiff's Exhibit number PX-4, which is a certified copy of a particular affidavit filed with the Lebanon Municipal Court which bears a signature.

A. Yes, sir; that seems to be it.

Q. Is that your signature, sir?

A. That is my signature, yes.

Q. And the only contact you had with that automobile, as you suggested, was after the issuance of this warrant?

A. That's the first time that I personally came in contact with the vehicle. I had knowledge of it before this but not any personal contact.

MR. McCROOM: Nothing further, your Honor.

CROSS-EXAMINATION

* * * *

Toller—Cross

[161] automobile in question.

Q. And did that information include as to the location that this automobile was in in relation to the Post Office when this man was apprehended in the back seat of this car?

A. Yes. We knew where the car was.

Q. And at that time you then ordered this particular automobile that this man was found in near the Post Office, you then ordered it impounded; is that what happened?

A. No, sir; if I could explain.

Q. Sure, explain. Go ahead.

A. At the time that I arrived at the Post Office the only two gentlemen there were the two in the back seat of the car. This did not include Mr. Livesay. I believe it was during the time we actually made a physical

search of the Post Office property that Mr. Livesay was found by one of our officers in this particular vehicle.

Now, the first contact I had with Mr. Livesay—I can't recall whether he was brought by the Post Office and then on to the Police Station or not. The first I can really remember is at the Police Department, and I believe that's the first contact I had with him.

Q. But the car that he was in was ordered impounded; is that correct?

Toller—Cross-Redirect

[162] A. That's right. I done it myself.

Q. And it was ordered impounded by you?

A. Yes, sir.

Q. Did you yourself search this automobile the next day?

A. Yes, sir; I did.

Q. And this search of the automobile that you made, was this prior to or was this after you had obtained the particular search warrant that Mr. McCroom just showed you before?

A. Yes, sir. We made great efforts to see that this was done. We were being very particular about it.

Q. I take it then arrest warrants and charges had already been filed against Mr. Livesay before this search warrant was issued?

A. Yes, sir; the day before.

Q. And before the—

A. Yes, sir; it was.

Q. Before the automobile was searched?

MR. NADEL: That's all I have.

REDIRECT EXAMINATION

BY MR. McCROOM:

Q. You did not sign the affidavit for the—Well, strike that.

You did not participate in any way in the

* * * *

[165] charge?

A. I believe our prosecutor would be in charge of the prosecution.

Q. Well, so far as the Police Department itself was concerned, are you the person there who was running it or responsible for it?

A. I had to do with the investigation of this.

Q. O. K. And they were both charged with attempted burglary or burglary; is that correct?

A. I believe Mr. Livesay was charged with burglary.

Q. And how about Mr. Edwards?

A. Burglary also.

Q. O. K. Are those prosecutions still pending?

MR. NADEL: Objection.

MR. TRAPP: Objection, your Honor.

THE COURT: Sustained.

Q Well, let's go back and maybe we will ask the question again.

A. All right, sir.

THE COURT: Evidently they are not.

MR. NADEL: I think they are.

Q. After they were taken into custody it's the procedure to have their clothing removed, is it not?

A. Yes, sir; it is.

[166] Q. And their clothing is kept in some manner or another so long as they remain in custody; is that correct?

A. Now, you mean are we generalising now or are we going for these two subjects?

Q. Let's talk about Mr. Edwards and Mr. Livesay.

A. Their clothing was removed from them; yes, sir, or they removed it for us on our request.

Q. You asked them to do it?

A. Yes, sir.

Q. You wanted their clothing?

A. Yes, sir.

Q. And you were going to get it whether or not they let you have it or not; is that correct?

MR. NADEL: Objection.

THE COURT: Well, they were in the jail.

MR. SMITH: I will withdraw the question, your Honor.

THE COURT: They were in the jail and the head police officer in the area says he wants their clothes. That's the situation. So beyond that isn't it argumentative?

MR. SMITH: It is, your Honor. I withdraw it.

THE COURT: Without much argument, I suppose if I am in jail and the head of the Police Department says, "I want your clothes," I know what

. . . .

SELECTIONS FROM THE TRIAL TRANSCRIPT

Ashley—Direct

[139] the intersection of West Main and Broadway, right on the same side of the street as the Golden Lamb is.

I pulled out, was going in this general direction and turned also as they turned and went west on West Main Street. When I had reached the alley again they were approximately at this position (indicating). I received a radio dispatch from our dispatcher that there had been—

THE COURT: It will be the same thing; just say what you did after the dispatch.

MR. SMITH: If the Court please, I have no objection to his testimony, what that radio dispatch was.

THE COURT: All right. Do you have any?

MR. McCROOM: None at all, your Honor.

THE COURT: All right. Go ahead then, Officer. Sorry.

A. (Continued.) I received a dispatch that there had been a burglar alarm sounded at the Post Office. Seeing these men in this position and the circumstance, I told them to enter the cruiser here (indicating), which they did.

Then I went on down to the intersection of South Street, turned south on South Sycamore, turned east on South Street. I came to the intersection of South Broadway, turned north on South Broadway and I parked—excuse me—my cruiser in front of the Post Office with these two subjects [140] in the vehicle.

There was also another officer there at this time. He went to the front of the Post Office. He was in this area. I went along this retaining wall also and back in this area and observed a window that at this time, all I could tell, a window that was open; screen also on the window was open at this time, just at a first glance, and it was the second window from the rear of the building on the north side.

Q. If you would, take a look at Plaintiff's Exhibit number 1 and tell us if you can what it is and where that window was that you were just talking about.

A. This is a diagram of the Post Office in Lebanon. I went up—There is a wall here. There is a wall—I think it runs back, comes up from the sidewalk and it runs along this fence. I went back to this point and observed the window here being open (indicating).

Q. O. K. Now, going back to when you first saw the men on the street, I believe you testified that you saw them first here on South Broadway?

A. Yes.

Q. Did you see any other persons on South Broadway at that time?

A. No, I did not.

Q. About what time of night was this when you [141] first saw them?

A. I'd say roughly it was after 11:00. It was 11:00 or a little after. I am not sure exactly of the time.

Q. Do you know at about what time you picked these men up?

A. I'd say it was after 11:05, 11:10 maybe.

Q. O. K. Would you look around the courtroom and see if you see any of the men that you picked up at this corner on that particular night?

A. I see one.

Q. And would you go over and point him out for the ladies and gentlemen of the jury?

THE DEFENDANT EDWARDS: I will stand up for him.

A. This gentleman.

MR. WINKLER: May the record show that the man he picked out was Eugene Howard Edwards?

THE COURT: Yes, sir.

Q. Now, will you continue your description of your investigation?

A. If I could have the other exhibit?

Q. (Handing.)

A. At this point other officers had arrived at the scene. I stayed in this general area. I crossed this fence, stayed in this area near the open window, watching [142] this window. Other officers had gone inside.

At this window, on the regular portion of the window—it's a wood window. At the bottom of the window there

were what appeared to be pry marks, indentation of a pry tool. At the top of the window there is a regular latch. This had been bent downward.

The window looked to have been forced up and there were paint chippings on the sill or on the windowsill. Also the screen was canted inward. If this would have been the screen, it would appear to be in, oh, about this much or about a 85, 40-degree angle, approximately.

The screen was—it's a mesh screen, and where the mesh met the edge of the screen, these had been broken. There is bars that go up into the ceiling this way (indicating). There is a latch. These had been bent and they were bent outward, the appearance that this had been forced open.

On the floor directly below this window there was a coffeepot and some type of liquid was lying on the floor. Also on the inner sill there was a liquid stains on this inner sill.

Q. O. K. Now, I believe you testified that when you came to the Post Office you came down this alley behind the Post Office; is that correct?

A. Yes. This would show the back of the

* * * *

[145] with normal police markings upon it. Also our police vehicles have the red light on the top of the vehicle.

Q. Will you describe this light on the top of it, what it looks like?

A. It's, oh, it's just a light. It's a regular red light, stands, oh, about a foot, a little over a foot high, and it comes up and is rounded at the top.

Q. What's it made out of?

A. It's made out of glass, and then a chrome base on it.

Q. And can you tell us, if you can, how high that dome extends from the ground?

A. It would be my height or slightly taller. I am approximately five eleven, so it would have been about six foot at the top.

Q. O. K. Would you at this time return to the witness stand, please?

Sergeant Ashley, at this time I hand you what has been marked—

MR. McCROOM: May we see them, counsel?

MR. WINKLER: (Handing.) I would like to strike the first portion of that last question.

Q. Now, Patrolman Ashley, after you made observations regarding this window back here, did you have occasion to conduct any other investigation in the area of [146] the Post Office that night?

A. Yes. I was advised by the senior officer to make notes, to photograph and to tag, obtain evidence, bag the evidence and take it to the police station.

Q. Now, when you say "evidence," what are you referring to?

A. Objects at the scene of the crime which we would believe that were instrumental in the commission of the crime.

Q. Now, what kind of objects are you referring to and where did you find them?

A. In my capacity, I found what appeared or what I thought was a pry bar—it's approximately a foot long—lying near the edge of the building, in front of the building.

Q. Could you come down here and explain where you found that?

A. I found the pry bar in approximately this position (indicating), lying along here; a pair of gloves in front of the wall here (indicating) and another pair of gloves right here. All of these items were photographed, then tagged, bagged and then taken to the Police Department by myself.

Q. Were they photographed in place?

A. Yes, they were photographed before they were [147] touched.

Q. Now, would you tell us, if you can, referring back to the time when you first saw Mr. Edwards on the sidewalk here, could you tell us how far you found those items from where you saw Mr. Edwards?

A. The items were found in this area (indicating). Mr. Edwards was found—I saw him approximately here.

This would be a distance of, oh, nine to ten feet to this point, maybe 12 feet, 15 feet to this point.

Q. All right. Now, will you return to the witness stand again?

Now, Mr. Ashley, I hand you what have been marked Plaintiff's Exhibits number 3, 4, 5, 6 and 7 for identification. I ask you to examine them and tell us, if you can, what they represent.

A. Plaintiff's Exhibit number 3 is a photograph of the window, the second from the rear on the north side that was found to be open. It shows the screen with the mesh being torn or broken away from the metal frame. It shows the paint chips on the outer sill, on the inner sill and on the portion in between of the window.

Plaintiff's Exhibit number 4 is a photograph of the window, the bottom of the actual window. It shows the pry marks in the bottom of this window. It also shows the screen being open at the lock, the point of the lock, and [148] again the mesh being torn; and if you would examine the photograph carefully, you can see the lockers in the back which were in the particular room, looks like a coffee break room.

Q. Who took those photographs?

A. I took these photographs. I also processed them, developed them.

Q. When did you take those photographs?

A. Shortly after the burglary had been committed, approximately midnight.

Q. Are the photographs shown in Plaintiff's Exhibits 3 and 4 fair and accurate representations of the window scene as you saw it—

A. Yes, they are.

Q. —on the night of May 31st, 1970?

A. Yes, they are.

Q. Would you go to the next photograph, please?

A. Plaintiff's Exhibit number 5 shows the pry bar. This was found, as I said, along the front of the building, which would be the east side.

Plaintiff's Exhibit number 6 shows a pair of rubberized, it looks, what were rubberized gloves, found near the bushes at the northern corner of the Post Office.

Plaintiff's Exhibit number 7 shows a pair of cotton gloves found in front of the wall between the

* * * *

[153] A. No, I do not. It's possible they could.

Q. I take it from your testimony that you just don't know what happened to them?

A. That's correct.

Q. I believe you said that you took Mr. Edwards and another man into custody that night, that you took them back to the Post Office?

A. Yes, I did.

Q. Now, what, if anything, did you do regarding these two men after they were at the Post Office?

A. They were still seated in the vehicle at this time. There were other officers around the vehicle. Shortly afterwards the captain of police in our department arrived and instructed me to take the two subjects, one being Mr. Edwards, that were in my vehicle to the Police Department. This was done. Both subjects were booked in and the property was taken in bags and placed in a safe place, and they were placed in separate cells in our cell area.

Q. What, if anything, separates these cells?

A. The cells are constructed of steel. The whole cell is steel, and it's made of, I believe, approximately one-quarter inch sheet steel, the sides, the back, the floor, part of the front side, the top, except for a small ventilation area, and the front is made of a steel door with

* * * *

Ashley—Cross

[172] Q. O. K. The exhibit number marker, the marker that identifies this as Plaintiff's Exhibit number 4, should be at the top of the picture as you look at it to have the picture properly oriented; right?

A. Yes, I would believe so on this picture.

Q. Yes, right. I think you indicated that you took these pictures about an hour or so after you got there. You took the pictures about 12:00 o'clock, I think you said?

A. Yes.

Q. And I assume that nothing had been disturbed in the area around the window at the time you took the pictures?

A. No, there hadn't. There had been a policeman watching so that this would not happen.

Q. So, so far as you know, and because there was a police officer there seeing that it remained that way, these pictures show the scene undisturbed by any kind of police activity; is that correct?

A. To the best of my knowledge, yes.

Q. O. K. Now, calling your attention to Plaintiff's Exhibit number 8, this indicates, does it not, the mesh screen on the window that was torn open in some way or other with the one side of that screen partially opened; is that correct?

A. Yes.

[173] Q. O. K. And there are little black marks or what appear on the photograph to be black marks along the windowsill; is that correct?

A. Yes.

Q. Are those the paint chips that you talked about?

A. Those were the paint chips that I saw.

Q. O. K. And this is an accurate representation of the sill with the paint chips on it as you saw it and before anything was removed from the sill; is that correct?

A. To the best of my knowledge, yes.

Q. O. K., you may go back to the stand, Officer.

In your best estimate how high is that windowsill from the ground level?

A. If I recall, it's only four—it's not very high off the ground. I can't give you exact measurement, but it's not very high at all. It's quite close to the ground.

Q. How wide is the window, the frame of the window?

A. Again, I couldn't give you an exact measurement. I didn't measure the window. The window is a two-pane window. I believe the Post Office would have exact measurements if you wish. I would say three and a half feet, offhand.

• • • •

[222] Q. All right. Now, directing your attention to that date, May 31st, 1970 at approximately 10:45 p.m. in the evening, did you have occasion to conduct an investigation in the area around the Lebanon, Ohio Post Office?

A. Yes, sir.

Q. Would you describe for the ladies and gentlemen of the jury the extent of that investigation?

A. We received a phone call or a radio dispatch to go to that location.

MR. McCROOM: Objection, your Honor, to the substance of that call.

THE COURT: O. K. All right, to the extent that the testimony is that the officer received a radio dispatch and thereafter went to the location, the testimony will stand. To the extent that the testimony has any indication of what was in the dispatch, the jury will please disregard it.

Q. Would you continue, Patrolman Stratton, and confine your testimony to what you did?

A. Could I come to the board?

Q. (Questioning look.)

A. Could I come to the board and describe?

THE COURT: Sure.

Q. Yes, you may.

A. Myself and Patrolman Ashley were dispatched to [223] the Post Office here on Broadway, on South Broadway. At this time I was in this area (indicating). We had a parking complaint here at the meat market. I was returning from that complaint and went past this car that we had a suspicious car report on.

MR. McCROOM: Objection, your Honor; move it be stricken.

Q. I can't hear. What was the testimony?

(Record read by the reporter.)

THE COURT: Very well. That part of the answer, the jury will please disregard that. The witness may testify to what he saw and what he did and not what anybody told him; and if somebody says that somebody told him something, just automatically forget it. Go ahead.

A. (Continued.) I went to this area here (indicating).

At that time I was dispatched back to the Post Office. I went back down South Sycamore Street, around—

Q. Did you do anything in that area when you were coming down South Sycamore Street?

A. Yes, sir. I flashed the lights on this particular car.

Q. What lights do you mean?

A. The cruiser light, the spotlight on the driver's side of the cruiser.

[224] Q. And what kind of automobile was this?

A. It was a tan Plymouth.

Q. Do you remember the license plate number on it by any chance?

A. Yes, sir; 8120-RS.

Q. All right. And what did you do after you flashed your spotlight into the car?

A. I continued on past the car, going to this intersection, South Sycamore and South Street, turned here on South Street, continued on over to South Broadway, went up South Broadway and stopped the cruiser right here in this area (indicating).

Q. Now, when you flashed your light on that automobile did you see anyone in the car?

A. No, sir.

Q. Do you know approximately what time of night that was?

A. No, sir. I would say approximately two minutes after we got the dispatch.

Q. All right. Will you continue then?

A. I got out of the cruiser and I went across to the Post Office, to the lobby. I went in the lobby area, that part of the Post Office being unlocked, went into the lobby. The Post Office in this area was secure. I came back out on the steps, met another officer. He advised me that [225] the Post Office had been—

Q. Try to confine your testimony to what you did and what you saw.

A. I came out here and went on around here to this driveway and on back here (indicating).

Q. What did you do back there?

A. I observed the rear end of the Post Office for approximately five minutes.

Q. And then what, if anything, did you do after that?
A. I was instructed to go back and check the car out again.
Q. All right.
A. Right here is an alley. I walked down this alley to South Street, walked on the sidewalk along South Street to Sycamore Street, got approximately in this area right here and stood behind a tree for approximately 30 seconds and observed the car. I then went on up to the car on the driver's side, the rear door of the car, and I looked into the car.
Q. Did you see anything?
A. Yes, sir. In the back seat there was an individual laying in the back seat.
Q. And then what, if anything, did you do after that?
[226] A. I opened the car door and asked him to step out of the car.
Q. Then what happened then?
A. He stepped out of the car. I asked him what his name was, what he was doing there.
Q. Did he make any explanation?
MR. McCROOM: I will object, your Honor.
THE COURT: What was the question?
MR. McCROOM: "Did he make any explanation"?
THE COURT: Sustained.
Q. All right. Go ahead and proceed.
A. He did give me his name.
MR. McCROOM: Object again, your Honor.
THE COURT: Sustained. What happened after whatever he said, what happened next?
A. (Continued.) Well, he was placed under arrest at that time, suspicious person. I searched him, handcuffed him and proceeded back down to this area towards South Street, on down South Street, and met a cruiser here (indicating), another cruiser. An officer in this area right here put him in the car and took him to the police station.
Q. Now, do you see that man in the courtroom today?
A. Yes, sir. He is sitting right there.
Q. The man with the beard?
[227] A. Yes, sir.
MR. WINKLER: May the record show that he has identified the defendant William Livesay?

THE COURT: Yes, it so may.

Q. Now, at the time that you arrested Mr. Livesay, did you search the automobile?

A. Yes.

Q. Don't say anything about anything you might have taken.

A. Yes, I did.

Q And what, if anything, did you find in the automobile?

MR. McCROOM: Object, your Honor.

THE COURT: Overruled.

A. I found a hammer in the front seat of the car. It was on the passenger side of the car.

Q. Mr. Stratton, I hand you what has been marked Plaintiff's Exhibit number 9 for identification. Will you please examine that and, if you can, tell the members of the jury what that is?

A. It is a roofing tool. It's explained to me as used in the roofing business.

Q. How do you know that's used in the roofing business?

A. The defendant at that time stated this was a

* * * *

Stratton—Direct—Cross

[230] Q. All right. What happened after he was taken to the police station.

A. At that time he was placed in a cell.

Q. Was he placed in a cell by himself?

A. Yes, sir.

Q. How many cells do they have in the Lebanon jail?

A. There are four cells altogether, three male and one female.

MR. WINKLER: I have no further questions of this witness, your Honor.

CROSS-EXAMINATION

BY MR. McCROOM:

Q. Patrolman Stratton, how long have you been employed by the Lebanon Police Department?

A. I am no longer employed at the Lebanon Police Department.

Q. (Questioning look.)

A. I was employed there for a year and a half.

Q. For a year and a half?

A. Yes, sir.

Q. How long had you been employed on May the 31st of 1970?

A. Just over a year.

Q. How long had you lived in Lebanon, Ohio on

* * * *

Molnar—Direct

[262] A. Well, that it was a light gray soil with nothing pertinent at the time of my examination.

Q. Now, Mr. Molnar, did you have an occasion to examine some clothing?

A. Yes, I did.

Q. Do you recall how much clothing was involved?

A. Well, I think there was about 10 sacks altogether from three individuals of clothing.

MR. TRAPP: Your Honor, we have several items here I would like to present for identification to the witness. Would it be all right if I presented one at a time or would you rather—

THE COURT: Either way you wish.

Q. Mr. Molnar, I am going to hand you what is marked as Plaintiff's Exhibit 13-A, 13-B and 13-C.

A. Is it all right to open it?

Q. Yes, go right ahead.

A. Yes, sir; I have seen these objects before.

Q. Now, can you tell the ladies and gentlemen of the jury what they are?

A. They are a blue shirt and trousers and a pair of shoes that I received from Captain Toller of the Lebanon Police Department.

Q. How do you know you received those from Captain Toller from the Lebanon Police Department?

[263] A. The paper sacks bear my case number of 70-11937, plus my initials are on each item, and they bear the name of the individual that was on it at the time I received it.

Q. Do you know the name of the individual on those?
A. Yes, sir. The person's name is Livesay.
Q. Now, Mr. Molnar, I am going to hand you what is marked as Plaintiff's Exhibit 14-A, 14-B, 14-C, 14-D. Take your time.
A. Yes, sir; I have seen these objects before.
Q. Can you identify those items marked as Plaintiff's Exhibit 14-A, B, C and D?
A. Yes, I can. These are a group of men's clothing that I received from Captain Toller of the Lebanon Police Department.
Q. And how do you know you received those from Captain Toller of the Lebanon Police Department?
A. These are all packaged in individual sacks in which I received them and on which I placed my Bureau case number of 70-11987. I placed my initials on each of the items in the exhibit and it bears the name of the individual that was on the sack at the time I received it.
Q. What's the name of the individual on those four items?
A. A person named Edwards.
[264] Q. Now, Mr. Molnar, did you examine each and every one of those items? By "those items," I mean Plaintiff's Exhibit 13-A, B and C and 14-A, B, C and D.
A. Yes, I did.
Q. And how did you examine them?
A. These were a visual and a microscopic examination conducted by opening the sacks individually on a large table, on a large piece of clean brown wrapping paper. Each item of clothing was opened, examined for any visible traces that might be on it and then it was swept and brushed for debris and the debris was collected.
Q. Mr. Molnar, will you explain to the Court first what you mean by the visual examination?
A. Well, a visual is just a looking over of the item by using eyesight, looking for anything particularly abnormal about the item.
Q. And did you say you brushed and swept this clothing?
A. Yes. Then after that then the clothing is brushed and swept and shaken for any possible loose debris or trace material that might be on the clothing.
Q. And how is this done?

A. This is done over the large piece of paper, by using a brush, a whisk broom, and also vacuuming with a small vacuum cleaner and a prepared trap.

[265] Q. Now, did you take each item individually and do this?

A. I did it with each group of clothing. These four sacks and these three sacks were done as one exhibit.

Q. Did you find any debris?

A. Yes, I did.

Q. Did you find any sweepings?

A. Yes, there were sweepings.

Q. And what did these sweepings consist of?

A. The sweepings consisted of some fine sand and soil, some lint, fibers, which are compatible with the fibers of the clothing. These are almost always found. And then in it I found a number of paint flakes in both sets of sweepings.

Q. Did you examine each and every one of these sweepings?

A. Yes, I did.

Q. How did you examine these sweepings?

A. The sweepings that were on the paper and from the sweeper were collected and put together in a common exhibit or a petri dish of that particular set of clothing. This was placed in a clean glass and then under a microscope, a stereoscopic microscope, this was searched for particular matter, looking and identifying the composition of these sweepings.

[266] Q. Did you find any soil?

A. Only some fine—some sand particles; no soil or earth particles that I could identify as such.

Q. Now, Mr. Molnar, you said that you conducted a visual and a microscopic examination of these clothing?

A. Yes.

Q. The debris of sweeping from these clothings; is that correct?

A. Yes.

Q. Now, microscopically why did you examine these sweepings?

A. Well, here again, in order—looking for trace material, sometimes to detect trace materials, it requires a

microscopic examination to detect the presence of small particulate matter that is of the size such as small paint chips, grains of sand, pieces of grass, lint and fiber and so forth and so on.

Q. Now, what did you do with the sweepings?

A. After my examination the sweepings were packaged into bags and identified as to being a certain specimen number as being the sweepings connected with the clothing on—one specimen of clothing and the other with the other specimen of clothing.

Q. Do you recall how many bags you made?

A. Three, I made three plastic bags of sweepings.

[207] Q. Mr. Molnar, I am going to hand you what is marked as Plaintiff's Exhibit 23-A, 23-B and 23-C. Will you tell the ladies and gentlemen of the jury just what those are?

A. Exhibits 23-A, B and C are the three plastic bags into which I placed the sweepings from the three sets of clothing that I examined in connection with this matter.

Q. How do you know you put the sweepings from the three sets of clothing in these three bags?

A. I have within each bag placed a small piece of paper upon which I have printed the debris from the clothing of the individuals named on the three sets of clothing that I examined, plus my initials are on there and the specimen.

Q. The initials and the what are on that?

A. The initials and the specimen number on it.

Q. Now, did you make a comparison of the paint samples that were brought to you by Captain Toller with the sweepings taken from those clothings?

A. Yes, I did.

Q. And what were your findings?

A. I found that in the debris from the clothing, I found particles and chips of green paint, green over a blue-gray paint and some green over green, that is two-layer green [208] paint, that in all three specimens.

Q. Now, Mr. Molnar, do you have an opinion within a reasonable scientific certainty that the paint chips from the clothing of Livesay and Edwards and the paint samples taken from the windowsill and from the screen of the Post Office in Lebanon, Ohio originated from the same source?

MR. SMITH: Objection, your Honor, may the Court please. Now, your Honor please, the objection is to the form of the question in that it presumes where this came from.

MR. TRAPP: Your Honor, he has testified these were sweepings brought to him.

THE COURT: Very well. I think the question maybe comes down to this. You have testified in respect of some sweepings that were taken from what's been marked here as identification 13, which sweepings were taken from bags, which bags when handed to you bore the name Livesay; and you have also testified in respect of some sweepings taken from what's been marked 14, and the clothing that's been in bags marked 14, those bags also bear the name Edwards, and you have also testified that you compared those sweepings with what's been identified as sweepings taken from an exhibit marked 15; [269] correct?

THE WITNESS: I can't recall the exhibit number.

THE COURT: Yes. The problem here is really mechanical in that the problem is defined as a common denominator. But somebody named Toller brought you some clothing in some bags marked Livesay and they brought you some clothing in some bags marked Edwards and you have identified those, and that's your testimony. He also brought you—Well, let's take first. You took sweepings from each of those clothes?

THE WITNESS: Yeah.

THE COURT: O. K. Then you testified that Toller also brought you what he said at the time were paint samples which he took from someplace. Now, you have examined the paint samples and you have also examined the sweepings; right?

THE WITNESS: Yes, sir.

THE COURT: Now, the question is first: Do you have an opinion based upon reasonable scientific probability on whether or not what was in the sweepings was exactly the same as what was in the sample?

THE WITNESS: That's what I understand the [270] question; yes, sir.

THE COURT: O. K. You can go ahead and answer the question over the objection.

A. Yes, sir; I do.

Q. And what is that opinion?

A. It's my opinion, based on my comparison and examination of the paints that I received from Captain Toller and the paints that I found in the two sets of clothing, that the paints found on the clothing are the same color of green paint, the same order of layering of green over blue-gray paint. They are the same color and texture and are so much alike that they can have originated from the same source.

THE COURT: Well now, wait a minute. The opinion is "so much alike that they could have originated from the same source." The question is—and you are the only person in this courtroom to whom this question could be addressed. We can't deal in "could's" or we can't deal in "may's" or we can't deal in "probable's." All we can deal in is reasonable scientific certainty.

Now, is this opinion in the field of reasonable scientific certainty or is it may or could? This is not critical.

THE WITNESS: I understand the problem. Within [271] the limits of the microscopic examination of these small particles of paint, all I can say is that the paints that I found in the sweepings and the paints are exactly alike to me as far as my examination can go.

THE COURT: O. K. Then we will have to say this to the jury. The jury will please disregard the expression of opinion, not take that into consideration. However, counsel may pursue the identity in what respects this witness found there to be similarity and dissimilarity. You can pursue the fact or you can pursue his expertise in what he found, what was alike and what was dissalike.

Q. Mr. Molnar, what were the similarities of the paint samples that you took from the clothing of Mr. Livesay and Edwards when you compared them with the paint samples that were taken—that were supplied to you by Captain Toller?

A. The similarities were that in both sets of paints the paints were green; they were of the same color. Some of the paints in both sets were of green, were over the same color of blue-green—or blue-gray paint. Some of the paint from the clothing and some of the paint from the sample from Captain Toller were two-layered green of

the same color, and the texture of the broken edges of the pieces were the [272] same in both sets of samples.

Q. Thank you, Mr. Molnar. Now, Mr. Molnar, did you report your findings, make a written report of these findings?

A. Yes, I did.

Q. And do you recall how many reports you made? Did you make more than one report?

A. Yes. I wrote a preliminary report on a part of the examination on the 14th, I believe.

Q. Mr. Molnar, I am going to hand you what is marked as Plaintiffs Exhibit number 86 for identification. (Showing documents to counsel.)

Mr. Molnar, you said you made two reports; is that correct; a preliminary report—

A. Yes, sir.

Q. —and did you make another report?

A. Yes, I did.

Q. Was that your final report?

A. Yes. The final report was the report of all the examination. The preliminary report involves examination of the paint samples with one set of clothing. The other, supplementary report, includes that finding plus the examination of the other two.

Q. Of the other two clothing?

A. Yes.

* * * *

Molnar—Cross

[286] person, but for each set of clothing I used one piece of paper and collected the debris. As it came off the shirt it was shook to the center and then dumped into the container, and then the second item of clothing was placed on it.

Q. O. K. Now, with respect to the Edwards shoes, did you find any debris or paint chips on those shoes?

A. No, I didn't find any on the shoes.

Q. Did you find any on the shirt?

A. On the shirt and the trousers, yes.

Q. On the shirt and the trousers. Any on the sweater?

A. Yes, I think on the sweater there was.

Q. So you found it on the shirt and on the sweater and on the trousers?

A. Yes.

Q. Some kind of debris?

A. Yes.

Q. And then you examined that and you compared it to what Captain Toller had given you that he identified as some paint chips; right?

A. Yes.

Q. And in that batch that you got out of the shirt and the pants and the sweater from Edwards you found some paint chips that matched microscopically in some

* * * *

Toller—Direct

[332] around and then went to the Police Department.

Q. Now, Captain Toller, while you are on the witness stand, you said you came into a room on the northwest side of the building; is that correct?

A. Yes, sir.

Q. Would you point to where that area is?

A. It is the room designated "swing room." I don't know what a "swing" is, but this is the room right here.

Q. Can you describe what's in that room?

A. There was a coke machine, a table, it seemed—in this area. It seemed to be a utility type room for breaks and things. That would be my guess.

Q. Where was this window that you said was open?

A. It was the second window, right here (indicating).

Q. Right about here (indicating)?

A. (Nodding.)

Q. Is this where you also observed the screen?

A. Yes, sir; it is.

Q. O. K. You may return to the witness stand. Thank you.

Now, just what did you observe about this screen?

A. It had been forced in. It was a screen that [333] folded from the side of the window to the center and a lock in the center, and this screen had been forced at the bottom.

Q. Approximately how large is that screen?

A. Well, I would say approximately five feet high and possibly 24 inches wide a half section, so probably be four by five, something of this nature. I am not sure of these measurements now.

Q. And you say this screen was forced in. Can you be a little more specific and tell us what you mean by "forced in"?

A. Where the screen joined in the center of the window, the one screen had been forced in. One side of this screen had been forced in.

Q. Was there some damage to the—

A. Yes, sir; there was.

Q. What kind of damage was this?

A. It appeared to be damage made forcing the screen open.

Q. Was there a hole, a slit?

A. The screen itself is a heavy—As near as I can describe it, would be the Cyclone type fencing, and where it joins the frame had been broken away in three or four places.

Q. Thank you. Now, you said you conducted a search of the area; is that correct?

[334] A. Yes, sir.

Q. After you concluded your search, what did you do then?

A. Looked around outside very briefly and went to the Police Department at that time.

Q. Approximately what time did you return to the police station?

A. About midnight. I don't know the time exactly.

Q. Did you bring anyone with you or did anyone accompany you?

A. No, sir. I drove my own personal car to the department.

Q. Do you recall if anybody was brought to the police station?

A. Yes, sir; there was.

Q. And who were these people that were brought?

A. Mr. Livesay and Mr. Edwards and one other subject.

Q. Do you recall who brought them to the police office?

A. Sergeant Ashley brought Mr. Edwards and one other subject, and I believe Patrolman Stratton brought Mr. Livesay.

Q. Now, after they were brought to the police [335] station what was done with these people?

A. There were placed in individual cells at this time.

Q. How many cells do you have in the jail there?

A. Four.

Q. Four individual cells?

A. Yes, sir.

Q. Would you briefly describe what these cells are like?

A. They are solid metal with the exception of the doorway, and just a normal jail would be about all I could say.

Q. After these people were incarcerated what did you do?

A. After a short time they were interviewed individually.

Q. And where was this interview conducted?

A. In my office.

Q. Did anyone assist you in that interview?

A. Yes, sir.

Q. And who was that person?

A. Lieutenant J. D. Saylors of our Department.

Q. Now, what, if anything, did you ask these people during the interview? Or, what did you do? Excuse me.

* * * *

[339] men who were in his office on the evening of May the 31st, 1970.

THE COURT: It may so.

Q. Now, what did you do as far as this interview was concerned, Captain? Did you conduct a further interview?

MR. SMITH: Your Honor, if the Court please, we object at this time. I don't know what the point of the question is, or I don't know what he is asking for, your Honor, and it may be—

THE COURT: Does counsel intend to elicit from this witness a statement, oral statement, attributed to either defendant?

MR. TRAPP: No, your Honor. I am just trying to show the sequence of events.

THE COURT: All right. Go ahead then.

Q. What did you do after you saw these two men, conducted the two men in your office?

A. After the interview?

Q. Yes.

A. They were placed back in their cells.

Q. Were they placed in individual cells?

A. Yes, sir.

Q. Now, Captain Toller, what did you do for the remainder of the evening?

[340] A. I had contact with Mr. Brawner, Agent Brawner, and then I went home and got some sleep.

Q. Now, who is Agent Brawner?

A. The gentleman on the end there (indicating).

Q. When you say "Agent Brawner," agent for what?

A. Postal Department.

Q. Postal Department?

A. Yes.

Q. All right. Now, I am going to direct your attention to June the 1st of the year 1970. What, if anything, did you do that day?

A. Well, in regards to this particular case, we started where we had left off the night before. Clothing was obtained for these subjects, new clothing, and the clothing was taken away and bagged for transportation to the crime lab.

Q. Where did you purchase this clothing?

A. In a department store named Kaufman's in Lebanon.

Q. What kind of clothing did you furnish these men?

A. Overall pants and T-shirts.

Q. Now, Captain Toller, did you bring each defendant to your office on that morning in question?

A. They were brought to my office at my [341] direction.

Q. And what was the purpose of bringing these men to your office?

A. To take their clothing.

Q. And did you remove their clothing?

A. They removed their clothing for us at our request.

Q. And who else was in your office?

A. Lieutenant Saylors.

Q. Did you bring each defendant separately?

A. Yes, sir; we did.

Q. And what did you do after each defendant removed his clothing?

A. The clothing was placed—each individual item was placed in a separate bag. It was initialed and identified by the subject the clothing came from, date and what the article was.

Q. Was it further identified—Oh, thank you. Captain Toller, I am going to hand you what is marked as Plaintiff's Exhibit 13-A, 13-B and 13-C. Sir, I am going to ask you to identify each of those three items.

MR. SMITH: Your Honor, if the Court please, in the interest of time, we will stipulate that Exhibits 14-A, B, C and D is the clothing that Captain Toller took from Mr. Edwards on that [342] morning.

THE COURT: Very well. Thank you, sir.

MR. McCROOM: Join in that stipulation, your Honor.

THE COURT: Very well, and 13-A, B, C, 14-A, B, C and D are admitted.

MR. TRAPP: Thank you, your Honor.

(Livesay's clothing and Edwards' clothing heretofore marked Plaintiff's Exhibits 13-A, 13-B, 13-C and 14-A, 14-B, 14-C and 14-D for identification were offered and received in evidence and are made a part of this record.)

Q. Captain Toller, what did you do with this clothing after you initialed it, marked it, tagged it, identified it?

A. It was stored in my office.

Q. Approximately how long?

A. On the 8th day of June I believe it was I transported this to the State crime lab at London, myself.

Q. Did you do this by yourself or in the company of another person?

A. I hand-carried this personally.

Q. And to whom did you deliver this?

A. This was delivered to the receiving clerk at BCI, the State crime lab.

[343] Q. When you say BCI, would you tell the ladies and gentlemen of the jury what that is?

A. The Bureau of Criminal Identification.

Q. And what was the purpose of taking it there?

A. To be checked as evidence.

Q. Now, Captain Toller, I am going to ask you what, if anything else, did you do on June the 1st of the year 1970?

A. I collected paint samples from the point of entry at the Post Office where a burglary had been attempted.

Q. And where was this?

A. This was at the window we discussed on the chart. There were paint samples laying on the outer sill, the inner sill. I also collected some scrapings from the screen itself that had been forced, and I took a sample of soil underneath the window.

Q. And what did you do with these samples of paint that you took from the inner sill, the outer sill, the window that was open and the scrapings from the screen?

A. These samples were collected in a small plastic bag, each separately, and was identified by placing a slip of paper inside each one, giving the location, date and my initials. These slips were in my own handwriting.

Q. You said you collected a soil sample. Where did you collect this soil sample?

A. Directly underneath the window at the point of

* * * *

[365] Q. So far as you know, nobody took it up?

A. No.

Q. And you didn't take it?

A. No.

Q. Did you take the other pair of gloves that are no longer available?

A. No.

Q. But you had reason to believe that in some manner or other those gloves too were somehow connected with this thing?

A. Could have been; yes, sir.

Q. When did you take the paint chips from around the window?

A. Before noon on the day of the 1st.

Q. But it was the following morning?

A. Yes, it was.

Q. So it was after Officer Ashley had taken these pictures of that window?

A. Yes, sir.

MR. SMITH: No further questions, your Honor.

REDIRECT EXAMINATION

BY MR. TRAPP:

Q. Captain Toller, I believe you stated on cross-examination that you and your police force maintain a working cooperation with the Post Office agents and the Post Office in

* * * *

Saylors—Direct

[375] MR. WINKLER: Our interest is in showing that the men were brought to Captain Toller's office individually and that's all we are interested in it doing.

MR. SMITH: Your Honor, if the Court please, we will stipulate that the men were individually brought to Captain Toller's office.

THE COURT: All right. Let's stay away from this interview because that always has a connotation that we all know about; and the Constitution says as clear as can be said if I am under arrest I don't have to say one thing and nobody will pay any attention to it.

O. K., let's go.

Q. Lieutenant Saylors, after the interviews were over what was done with the prisoners?

A. They were returned back to the cell.

Q. Were they placed in individual cells?

A. Yes, they were.

Q. Now, Lieutenant Saylors, I am going to direct your attention to the morning of June the 1st of 1970. What, if anything, did you do?

A. Again I met in Captain Toller's office and then I departed the office and went to Kaufman's Clothing Store, where I purchased some clothing for the defendants, the [376] three people.

Q. And after you purchased this clothing what did you do?

A. I returned back to the police station, back to Captain Toller's office. The prisoners were brought in, one at a time, and the clothing were exchanged. Their clothing were taken from their person and placed in individual packets, grocery sacks, and they were initialed and labeled by Captain Toller and myself.

MR. TRAPPP: Gentlemen, are you willing to stipulate—

MR. SMITH: Your Honor, we have already stipulated the bags. We stipulate them again.

MR. TRAPP: All right.

Q. Where was this clothing kept, to the best of your knowledge, Lieutenant Saylors?

A. In the custody of Captain Toller, under lock and key in his office.

Q. Lieutenant Saylors, do you recall making a trip to London, Ohio?

A. Yes, I did.

Q. Do you recall what the purpose of that trip was?

A. Pertaining to these people, the first trip was about the 15th of June. I went to London to receive a

* * * *

Beckman—Direct

[434] Mr. Edwards.

MR. McCROOM: I will object.

THE COURT: O. K. I think we can maybe end this repeating if we just understand that the objection is caused by difficulty in terminology, or it's always hard to communicate, say, one field of business or science into another; and whenever a witness uses the term

"known" with one of these people, they have to object as lawyers.

Now, you as jurors know that when the witness uses the term "known" or "it came from," that he doesn't know anything about actually where these came from. He is not using it in that sense.

So I think if we all understand that, maybe we can go ahead and everybody will understand each other and counsel won't have to object, which they obviously have had to do. That's no criticism of you, sir. We all have the same problem.

THE WITNESS: Thank you.

A. (Continued.) Well, on top of this series of spectra I have listed K as being the known, Q1 as being a piece of paint which I found in the debris coming from the defendant Edwards' clothing; and Q2, a piece of paint which I found coming from the defendant Livesay's clothing and Q3 is paint coming from another defendant who is not involved.

* * * *

[470] accurately states what he can give an opinion on.

THE COURT: All right. It will be limited to that.

MR. TRAPP: All right, your Honor. I will rephrase the question, limiting it to the paint sample from inside of the windowsill in the Lebanon Post Office.

Q Mr. Beckman, on the basis of your microscopic examination and on the basis of your examination by neutron activation analysis, do you have an opinion within a reasonable degree of scientific certainty as to whether the paint samples, the questioned paint samples, which were labeled as coming from the defendants' clothing, the two defendants' clothing, and the known paint samples labeled as coming from inside the windowsill of the Lebanon Post Office, originated or came from the same source?

THE COURT: You may answer.

A. Yes, sir.

Q. And what is that opinion?

A. On the basis of the microscopic agreement in which there were four layers in both of the questioned exhibits

and there were four layers on the known exhibits, that these layers did microscopically match; and on the basis of having the same trace element composition, at least qualitatively, and also on the basis of having four layers [471] of paint and only occurring in five elements—this is unusual—I would say that these two paint samples Q1 and Q2 which came from two of the defendants' clothing did come from the same source that the K paint sample came from.

Q. Thank you, Mr. Beckman. I have a couple of more questions, sir.

Mr. Beckman, why did you choose neutron activation analysis over other conventional means of trace elemental analysis?

A. Well, there are three good reasons why I chose neutron activation over anything else. The first one is the high detection level that we have. Like I said before, radioactive processes are by far the more superior for detection level.

To give you a feel of this, atomic absorption is another form of elemental analysis and it's considered to be very, very good. It has a detection level of what we can detect of one part per billion of an element. So if this is supposed to be one part per billion copper, we could detect this with atomic absorption. Well, neutron activation happens to be 1,000 times even more sensitive or have a higher detection level than atomic absorption.

The second reason is the sample size. I have talked about this earlier. I routinely analyse paint samples, human hairs, which weigh only a few micrograms. A small human

• • • •

SUPREME COURT OF THE UNITED STATES

No. 78-88

UNITED STATES, PETITIONER

v.

EUGENE H. EDWARDS and WILLIAM T. LIVESAY

ORDER ALLOWING CERTIORARI—Filed October 9, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

★ U. S. GOVERNMENT PRINTING OFFICE: 1978 [illegible] 199

No. 73-88

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT H. BORK,
Solicitor General,
KENT L. TEMPLEMAN,
Assistant Attorney General,
EDWARD S. SMITH,
Assistant to the Solicitor General,
THOMAS M. PITZ,
VICTOR D. STONE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Reasons for granting the writ	3
Conclusion	11

CITATIONS

Cady v. *Dombrowski*, No. 72-586, decided June 21, 1973	7
Chambers v. *Maroney*, 399 U.S. 42	7
Chapman v. *United States*, 365 U.S. 610	5
Chimel v. *California*, 395 U.S. 752	5, 8
Coolidge v. *New Hampshire*, 403 U.S. 443	7, 8
Johnson v. *United States*, 333 U.S. 10	5, 8
Ker v. *State of California*, 374 U.S. 23	10
Lanza v. *New York*, 370 U.S. 139	7, 9
McDonald v. *United States*, 335 U.S. 451	5, 8
Preston v. *United States*, 376 U.S. 364	7, 10
Schmerber v. *California*, 384 U.S. 757	8
Terry v. *Ohio*, 392 U.S. 1	6, 7
United States v. *Barone*, 330 F. 2d 543, certiorari denied, 377 U.S. 1004	10
United States v. *Caruso*, 358 F. 2d 184	4, 10
United States v. *DeLeo*, 422 F. 2d 487, certiorari denied, 397 U.S. 1037	4, 9
United States v. *Williams*, 416 F. 2d 4	4
Weeks v. *United States*, 232 U.S. 383	6
Constitution and Statutes:	
U.S. Constitution, Fourth Amendment	3
18 U.S.C. 2115	2
28 U.S.C. 1254(1)	2
Miscellaneous:	
T. Taylor, *Two Studies in Constitutional Interpretation* (1969)	6

508-169—75——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in these two cases.

OPINION BELOW

The opinion of the court of appeals in *Edwards* (App. A, pp. 1a–15a) is reported at 474 F. 2d 1206. The court of appeals did not enter an opinion in *Livesay*, but entered an order (App. B, p. 16a) reversing the judgment of conviction on the basis of its opinion in *Edwards*.

JURISDICTION

The judgment of the court of appeals in *Edwards* (App. C, p. 17a) was entered on March 8, 1973, and in *Livesay* (App. B, p. 16a) on April 11, 1973. Timely

petitions for rehearing with suggestion for rehearing *en banc* in both cases were denied on May 10, 1973 (Apps. D. and E, pp. 18a, 19a). On May 31, 1973, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to July 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the taking of clothing worn by a defendant, without a warrant, after he has been lawfully arrested and taken into custody for the commission of an offense, is an unreasonable search and seizure when there was probable cause to believe that the clothing contained evidence of the defendant's complicity in the offense.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Ohio, respondents were convicted of attempting to break and enter a United States Post Office, in violation of 18 U.S.C. 2115.

The facts, which are not in dispute and are recounted at length in the opinion of the court of appeals (App. A, pp. 1a-3a), are that shortly before midnight on May 21, 1970, respondents were lawfully arrested and charged with attempting to break into the Lebanon, Ohio, post office. Later that night, an investigation by local police authorities revealed that the attempt to enter the post office had been made through a window on the north side of the building. The window was inspected, and paint samples were taken the next morning from the window sill (*id.* at 3a). On that

morning, the police officers purchased new trousers for respondents, who were still dressed in the clothing which they had been wearing at the time of their arrest (*id.* at 3a). At the officers' request, respondents turned over to the officers the trousers they had been wearing and donned the new ones. Scientific examination and comparison of paint traces found on respondents' clothing with paint chips taken from the vicinity of the damaged post office window showed that both samples came from the same source (*id.* at 3a).

After an evidentiary hearing, the district court overruled respondents' motion to suppress the results of the examination of the paint chips as the fruit of the allegedly unlawful taking of their clothing. On appeal, the court of appeals reversed. It concluded that, although respondents' arrest was lawful and probable cause existed for the seizure of the clothing, the failure of the police officers to obtain a warrant rendered the search unlawful. The court held that "a search cannot be incident to an arrest after the administrative process and the mechanics of the arrest have come to a halt and the prisoner is in jail. At this point, the justifications for the 'search incident' exception no longer exist" (App. A, p. 10a). Accordingly, after concluding that there was no other justification for the warrantless seizure, the court held that the suppression motion was improperly denied.

REASONS FOR GRANTING THE WRIT

This case raises an important issue involving the application of the Warrant Clause of the Fourth Amendment to the seizure of evidence, based on prob-

able cause, from one who is lawfully in custody at the time of the seizure. The court of appeals, expressly rejecting the contrary holdings of two other circuits (App. A, p. 10a), held that where law enforcement officers do not thoroughly search and seize all personal effects immediately after an arrest, a subsequent warrantless seizure some hours after the arrest violates the Fourth Amendment. The holding of the court of appeals constitutes an unreasonable departure from the policy underlying the Warrant Clause and is based principally upon a mistaken reliance on cases in other contexts which are inapposite here.

1. As the court of appeals recognized (App. A, pp. 9a–10a), its holding that the "seizure" of the respondents' trousers while they were in custody constituted an unreasonable search and seizure conflicts with *United States* v. *Caruso*, 358 F. 2d 184, 185–186 (C.A. 2), and *United States* v. *Williams*, 416 F. 2d 4 (C.A. 5). It also conflicts with *United States* v. *DeLeo*, 422 F. 2d 487 (C.A. 1), certiorari denied, 397 U.S. 1037. In each of those cases the court held that, consistent with the Fourth Amendment, the police may search the clothing of someone in lawful custody without first obtaining a warrant. In the present case, on the other hand, the Court of Appeals for the Sixth Circuit held that the failure to obtain a warrant rendered the search illegal.

It is important for this Court to resolve the conflict because of the need to have clear rules for applying the Fourth Amendment. As Mr. Justice Frankfurter stated: "Since searches and seizures play such a frequent role in federal criminal trials, it is most important that the law on searches and seizures by

which prosecutors and trial judges are to be guided should be as clear and unconfusing as the nature of the subject matter permits." *Chapman* v. *United States*, 365 U.S. 610, 618 (concurring opinion). The validity of jailhouse searches made after a defendant has been lawfully arrested is an issue of substantial and continuing importance in criminal law enforcement, and this Court should decide the question.

2. The holding of the court of appeals extending the warrant requirement to a seizure of clothing worn by a defendant already validly incarcerated constitutes an unreasonable extension of the Warrant Clause to a situation in which few, if any, of the important values which that clause is intended to serve are implicated. The basic function of the Warrant Clause is to interpose a detached magistrate between the police and the privacy of a citizen's home. "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. * * * And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home" (*McDonald* v. *United States*, 335 U.S. 451, 455-456; *Chimel* v. *California*, 395 U.S. 752; *Johnson* v. *United States*, 333 U.S. 10, 14).

This policy consideration is, however, not present where a citizen's right of privacy has already been lawfully restricted through his arrest, and he is in custody. The Warrant Clause was intended principally to eliminate unrestricted invasions of homes, places of business and like areas without a warrant or pursuant to general warrants. Searches which followed

the taking of a citizen into custody "involved none of the[se] abuses * * *. The only victims of such searches were those who, as probable felons, were the objects of hue and cry, hot pursuit or an arrest warrant," and it was accepted that "their persons [should] be subject to search for the fruits of their crimes, or the weapons, clothes or other objects that might identify them as felons." T. Taylor, *Two Studies in Constitutional Interpretation* (1969), p. 39.

Accordingly, it is settled that after the arrest of a defendant, law enforcement officers may undertake "a relatively extensive exploration of the person" not only for concealed weapons but for evidence which he may have in his possession. *Terry* v. *Ohio*, 392 U.S. 1, 25; *Weeks* v. *United States*, 232 U.S. 383, 392. While the cases suggest that such a warrantless search for evidence is justified immediately after arrest in order to prevent its possible destruction by the defendant before a search warrant may be obtained, this justification cannot alone support such a search, since other methods, far less intrusive than a full blown search—such as the handcuffing of a defendant after his arrest and after he has been frisked for weapons—would prevent destruction of evidence on his person pending the action of a magistrate.

The ultimate justification for such a post-arrest search of the defendant is that, since a defendant's freedom and privacy have already been lawfully restrained, the need for protection against invasion of privacy, about which the Framers of the Fourth Amendment were concerned, is not present. Under these circumstances, assuming the Fourth Amend-

ment is applicable at all to jailhouse searches of prisoners (cf. *Lanza* v. *New York*, 370 U.S. 139, 143), we submit that "the conduct involved in this case must be tested only by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry* v. *Ohio*, *supra*, 392 U.S. at 20.

Preston v. *United States*, 376 U.S. 364, upon which the court of appeals relied for a contrary result, is inapposite here. That case involved the warrantless search of an automobile, without probable cause, some five hours after the arrest of the defendants. In holding that the search of the vehicle was unjustified, the Court wrote (376 U.S. 367):

> Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.

This Court subsequently limited *Preston* to establishing only that a search and seizure of an automobile made at a place other than where the arrest took place, *without probable cause*, is an unreasonable search and seizure that cannot be justified as incident to lawful arrest. *Chamber* v. *Maroney*, 399 U.S. 42. See, also *Cady* v. *Dombrowski*, No. 72-586, decided June 21, 1973. Where, however, probable cause to search for evidence or contraband exists, then a search of an automobile after an arrest "made at another place, without a warrant" does *not* violate the Warrant Clause. *Chambers* v. *Maroney*, 399 U.S. 42, 46-52. As the Court observed in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 463, n. 20, "[t]he rationale of *Chambers* is that *given* a justified initial intrusion [*i.e.*, respondents'

arrest], there is little difference between a search on the open highway and a later search at the station." This "rationale" supports the propriety of the search and seizure of respondents' trousers here.[1]

Chimel v. California, 395 U.S. 752, and *Coolidge v. New Hampshire*, *supra*, upon which the court of appeals also relied, are likewise inapposite. The holdings in those cases regarding the limited scope of a search incident to arrest were made in the context of situations in which law enforcement officers attempted to justify extensive searches of a defendant's home—including areas beyond the defendant's immediate reach—as incident to his arrest. Those searches involved an area which the Fourth Amendment intended to protect from warrantless intrusions by law enforcement officers.[2] A "top-to-bottom search of a man's house" (*Chimel v. California*, *supra*, 395 U.S. 766–767, n. 12) was not considered a "minor" invasion of his privacy to be tolerated as incidental to his lawful arrest. In those cases the Court held that, barring exigent circumstances, a search of a defendant's home incident to arrest must be limited to his person and

---

[1] This case does not involve an search or "intrusion into the human body" (*Schmerber v. California*, 384 U.S. 757, 770), where, barring exigent circumstances, the substantial invasion of privacy involved might require a warrant.

[2] See, e.g., *Johnson v. United States*, 333 U.S. 10, 14: "The right of officers to thrust themselves into a home is also a grave concern, * * *"; *Schmerber v. California*, 384 U.S. 757, 770: "Search warrants are ordinarily required for searches of dwellings * * *"; *McDonald v. United States*, 335 U.S. 451, 456: "* * * the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home."

the areas within his immediate reach (395 U.S. 766). As the Court of Appeals for the First Circuit stated in rejecting a claim similar to that raised here (*United States* v. ~~Deleo~~, *supra*, 422 F. 2d at 492): "We read *Chimel* as being acutely concerned about the increasing legitimation of wide-ranging warrantless searches of lodgings and buildings based on the fortuity of arrest on the premises * * *."

A search and seizure of the personal effects of a defendant after he has been lawfully incarcerated is hardly comparable to the invasion of privacy which accompanies a "top-to-bottom search of a man's house". Indeed, *Lanza* v. *New York*, 370 U.S. 139, 143, rejected out of hand the suggestion "that a public jail is the equivalent of a man's 'house' *or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects* * * *" (emphasis added). Moreover, as we have shown, post-arrest searches have historically been held to be beyond the ambit of the Warrant Clause.

Accordingly, we submit that the court of appeals erred in concluding that the search of petitioner's clothing after his arrest and while he was lawfully in custody violated the Fourth Amendment because no warrant was obtained. Rather, the validity of the seizure should have been tested against the general proscription barring unreasonable searches and seizures.

3. The "seizure" of the defendant's trousers while he was lawfully in custody did not violate the Fourth Amendment proscription against unreasonable searches and seizures. As the court of appeals held,

there was probable cause to believe that the trousers contained evidence of respondents' complicity in the crime. The "seizure" did not subject respondents to any personal humiliation (as would the seizure of trousers immediately following arrest on a public street). On the contrary, the police officers waited until morning to purchase new pairs of trousers before they asked the respondents to remove their own. The conduct of the police officers was unexceptionable and did not involve any overreaching use of force or coercion. As the Court of Appeals for the Second Circuit observed in *United States* v. *Caruso*, 358 F. 2d 184, 185–186:

> Appellant argues on the basis of Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), that it is the time lapse of about six hours between the moment of arrest and the final taking and holding of his clothes by the F.B.I. which violated his Fourth Amendment Federal Constitutional rights. But this case is distinguishable from *Preston* because there the question concerned the search of an automobile long after the defendants had been put in jail. Here the clothes were constantly in sight, were taken on the person of the suspect at the time of arrest and were continuously in custody. Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); United States v. Barone, 330 F.2d 543, 544 (2d Cir. 1964), cert. denied, 377 U.S. 1004, 84 S.Ct. 1940, 12 L.Ed.2d 1053 (1964).
>
> The appellant's contention means that the seizure of his clothing could have been made constitutionally only if, immediately on his arrest, he had been stripped to the buff on the

public highway. Even though that April 13th may have been a very pleasant spring day, we are of the opinion that the argument is somewhat extreme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
EDWARD R. KORMAN,
Assistant to the Solicitor General.
JEROME M. FEIT,
VICTOR D. STONE,
Attorneys.

JUNE 1973.

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE H. EDWARDS and WILLIAM T. LIVESAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION

ROBERT H. BORK,
Solicitor General,

HENRY E. PETERSEN,
Assistant Attorney General,

JEROME M. FEIT,
VICTOR STONE,
Attorneys,
Department of Justice,
Washington, D.C. 20530

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1219

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

EUGENE HOWARD EDWARDS, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed March 8, 1973.

Before CELEBREZZE, McCREE and LIVELY, Circuit Judges.

CELEBREZZE, Circuit Judge. Appellant appeals from his conviction in a jury trial of attempted breaking and entry of a United States Post Office in violation of 18 U.S.C. § 2115. On May 21, 1970, at about 10:50 p.m. Patrolman Ashley of the Lebanon, Ohio Police Department was on duty in his cruiser and received a radio transmission advising him that a suspicious tan Plymouth with out-of-town license plates was parked on South Sycamore Street near the Post Office Building, that three men were seen leaving the vehicle and that two persons had been seen at a meat locker at the intersection of South

Street and South Sycamore Street. Ashley examined the Plymouth, found it empty, checked the meat locker and found nothing amiss there.

Patrolman Ashley then drove northward on South Sycamore Street to Main Street, east on Main Street to the alley that runs in a north-south direction behind the Lebanon Post Office and turned south down the alley. Upon reaching the intersection of the alley and the Post Office driveway, Ashley then turned into the driveway. He went in back of the building, checked the windows there and along the side of the building.

Upon reaching the west sidewalk of Broadway, he looked to his left and observed two men, one of whom was the Appellant Edwards, on the west sidewalk of Broadway at a point approximately even with the extension of the north line of the Post Office building. At the time Ashley first observed them Edwards and his companion had their backs to him and were walking in a northerly direction on the West sidewalk of Broadway. They walked in a normal manner without looking over their shoulders or turning around to the intersection of Broadway and Main Street where they crossed Main Street to the northwest corner of the intersection and then turned west on the north sidewalk of Main Street.

When Edwards had reached and crossed the alley that intersects Main Street, Ashley received a radio transmission advising him that the burglar alarm system at the Post Office had been activated. He immediately overtook and apprehended Edwards and his companion, placed the two men in his cruiser and returned to the Post Office. Shortly thereafter Ashley took Edwards to the Lebanon Police Station where he was placed in a cell. Patrolman Ashley testified

that approximately three minutes elapsed from the time he first observed Edwards on the sidewalk to the time that he received the radio transmission advising him that the Post Office burglar alarm had been activated.

On the same evening an investigation by Ashley and several other members of the Lebanon Police Department, including Captain James Toller, who took paint samples from the window sill and the wire mesh screen, revealed that an attempt had been made to gain entrance through a window located on the north side of the building. On the following morning the Lebanon Police Department purchased new clothing for Edwards and took from him the clothing he was wearing at the time of his arrest.

Subsequent microscopic comparison of paint chips obtained from Edwards' clothing with chips from the vicinity of the damaged Post Office window made by the Ohio Bureau of Criminal Identification and Investigation revealed significant similarities. The paint samples were also examined microscopically and by means of a process known as neutron activation analysis at the Post Office laboratory in Washington, D.C., which indicated that such samples came or originated from the same source.

A motion to suppress the paint chips found in Edwards' clothing was filed and, following an evidentiary hearing, was overruled.

The alarm system at the Lebanon Post Office was triggered by sound and is silent in that nothing occurs at the Post Office to indicate that the alarm has been activated. By means of a wireless transmitter an alarm bell is sounded in the home of a nearby resident.

Two issues are raised on this appeal. First, Appellant contends that Patrolman Ashley did not have

probable cause to arrest him and that his arrest was therefore unlawful. Second, Appellant contends that the seizure and search of his clothing was unlawful because it was made after he had been in custody for ten hours. We reverse the determination of the District Court that the seizure of the clothing was lawful.

We first examine the question concerning the validity of the arrest. Whether an arrest is constitutionally valid depends upon "whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964); *Carroll* v. *United States* 267 U.S. 132 (1925).

The problem posed by this case, as it was in *Brinegar* v. *United States*, 338 U.S. 160 (1949), is determining where the line is to be drawn between mere suspicion and probable cause. The Supreme Court in *Brinegar*, *supra*, said "[t]hat line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account of all the circumstances." 338 U.S. at 176. We think that under the facts of this case, there was probable cause to arrest the Appellant. He and his companion were seen directly in front of the Post Office three minutes before the message came that the alarm had gone off. They were the only persons observed by the officer in that vicinity and it was late on a Sunday night when few people were on the street. Patrolman Ashley testified that it appeared as though the two men had just turned out of the drive leading

to the Post Office. We hold that probable cause for the arrest existed at the time Appellant was apprehended.

It next must be determined whether the removal and testing of Appellant's clothing for paint chips without a warrant was lawful.

We start with the premise that, absent some exception, a search or seizure cannot lawfully be made without the prior issuance of a warrant. The Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), reiterated this premise:

> Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and

> industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. 403 U.S. at 454-5.

The two basic exceptions to the rule are those searches and seizures made incident to a lawful arrest and those made during the existence of exigent circumstances.

We begin with an examination of the "search incident" exception. It is contended by the Government that Appellant's clothing was seized incident to his arrest.

A search conducted incident to a lawful arrest must be limited to a carefully defined area, *Chimel v. California*, 395 U.S. 752, 762-3 (1969), and must be substantially contemporaneous with and confined to the immediate vicinity of the arrest, *Stoner v. California*, 376 U.S. 483, 486 (1964), *Coolidge v. New Hampshire*, *supra*, 403 U.S. at 456. In *Chimel v. California*, *supra*, the Supreme Court substantially restricted the "search incident" exception to the warrant requirement. The Court defined the proper extent of a search incident to an arrest:

> "A similar analysis underlies the 'search incident to arrest' principle, and marks its proper extent. When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might

> reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 762-3.

The Court reviewed the test of reasonableness as approved in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), and *Harris* v. *United States*, 331 U.S. 145 (1947), and determined that a reasonableness test cannot be substituted for the Fourth Amendment:

> "Thus, although '[t]he recurring questions of the reasonableness of searches' depends upon 'the facts and circumstances—the total atmosphere of the case,' [citation omitted], those facts and circumstances must be viewed in the light of established Fourth Amendment principles." 395 U.S. at 765.

The concern of the Court in *Chimel* was that the reasonableness test had permitted searches beyond the arrested person himself and the area within his immediate control. Even under the *Chimel* rationale, however, "a search of the person of an arrestee and of the area under his immediate control could be carried out without a warrant. [The Court] did not indicate there . . . that the police must obtain a warrant if they anticipate that they will find specific

evidence during the course of the search." *Coolidge v. New Hampshire*, 403 U.S. 443, 482 (1971). In the present case the search did not extend beyond the person of the Appellant. The clothing seized and searched certainly was within his immediate control and probable cause existed to believe that paint chips would be found on the clothing. The Supreme Court has rejected the distinction between mere evidence and instrumentalities, fruits of crime or contraband found during a lawful search, as long as there is a nexus "between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Warden v. Hayden*, 387 U.S. 294, 307 (1967). In this case, there was cause for such a belief. Appellant's clothing could, therefore, properly have been the subject of a search incident to a lawful arrest because it was within the limited area defined in *Chimel v. California*, *supra*.

The question remains, however, as to whether the seizure was substantially contemporaneous with and confined to the immediate vicinity of the arrest. The removal of Appellant's clothing did not occur until some ten hours after his arrest.[1] In *Preston v. United*

---

[1] Several courts have held that laboratory testing of the clothing of a jailed person without a warrant is permissible. *Hancock v. Nelson*, 365 F.2d 249 (1st Cir. 1966); *Gollihar v. United States*, 362 F.2d 694 (8th Cir. 1966); *Whalem v. United States*, 346 F.2d 812 (D.C. Cir. en banc 1965); *Robinson v. United States*, 285 F.2d 106 (D.C. Cir. 1960), cert. denied, 364 U.S. 919; *United States v. Guido*, 251 F.2d 1 (7th Cir. 1958). In these cases the court was not presented with the constitutional problem of the time delay presented here.

States, 376 U.S. 364 (1964), the Supreme Court said:

> "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 376 U.S. at 367.

While *Preston* involved the search of an automobile, the same rule is applicable to the search of an individual. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). Some Courts have distinguished *Preston* and rendered contrary decisions. In *United States v. Caruso*, 358 F.2d 184 (2d Cir. 1966), the Court found that the removal and search of Appellant's clothing at the police station some six hours after his arrest did not violate his Fourth Amendment rights.[1] *Also see Mil-*

---

[1] The Court in *Caruso* distinguished the holding in *Preston*:

> "Appellant argues on the basis of Preston v. United States 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), that it is the time lapse of about six hours between the moment of arrest and the final taking and holding of his clothes by the F.B.I. which violated his Fourth Amendment Federal Constitutional rights. But this case is distinguishable from *Preston* because there the question concerned the search of an automobile long after the defendants had been put in jail. Here the clothes were constantly in sight, were taken on the person of the suspect at the time of arrest and were continuously in custody. Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); United States v. Barone, 330 F.2d 543, 544 (2d Cir. 1964), cert. denied, 377 U.S. 1004, 84 S.Ct. 1940, 12 L.Ed.2d 1053 (1964).
>
> The appellant's contention means that the seizure of his clothing could have been made constitutionally only

ler v. *Eklund*, 364 F.2d 976 (9th Cir. 1966). And in *United States* v. *Williams*, 416 F.2d 4 (5th Cir. 1969), the Court upheld a seizure of clothing made several hours after the arrest for the purpose of laboratory testing, because the seizure was "an integral part of, and therefore incident to, the process of arrest." 416 F.2d at 8. *See United States* v. *Gonsales-Peres*, 426 F.2d 1283, 1287 (5th Cir. 1970). We do not agree with this approach. The exception to the warrant requirement is that the search be incident to the arrest. We do not find that a seizure of clothing made long after the events of the arrest have ended can be an integral part of the arrest. While circumstances might render it possible that

> "[a] search of an arrestee is still incident to an arrest when it is conducted shortly thereafter at the jail or place of detention rather than at the time and place of arrest," *United States* v. *Gonsales-Peres*, *supra*, 426 F.2d at 1287,

a search cannot be incident to an arrest after the administrative process and the mechanics of the arrest have come to a halt and the prisoner is in jail. At this point, the justifications for the "search incident" exception no longer exist. It is well to recall these justifications as stated in *Preston* v. *United States*, *supra*, and reiterated in *Chimel* v. *California*, *supra*:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize wea-

---

if, immediately on his arrest, he had been stripped to the buff on the public highway. Even though that April 13th may have been a very pleasant spring day, we are of the opinion that the argument is somewhat extreme." 368 F.2d at 185-186.

> pons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest." 395 U.S. at 764.

The Supreme Court in *Coolidge* v. *New Hampshire*, *supra*, again recognized that the search incident exception is based on these justifications:

> "The Court [in *Chimel*] applied the basic rule that the 'search incident to arrest' is an exception to the warrant requirement and that its scope must therefore be strictly defined in terms of the justifying 'exigent circumstances.' The exigency in question arises from the dangers of harm to the arresting officer and of destruction of evidence within the reach of the arrestee." 403 U.S. at 478.

Nor can the seizure be deemed a matter of reasonable police practice pursuant to a lawful arrest. In *Coolidge* the Supreme Court rejected such a theory:

> The rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions," is not so frail that its continuing vitality depends on the fate of a supposed doctrine of warrantless arrest. The warrant requirement has been a valued part of our constitutional law for decades, and it has determined

> the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly over-zealous executive officers" who are a part of any system of law enforcement. If it is to be a true guide to constitutional police action, rather than just a pious phrase, then "[t]he exceptions cannot be enthroned into the rule." *United States* v. *Rabinowitz, supra*, . . . (Frankfurter, J., dissenting). The confinement of the exceptions to their appropriate scope was the function of *Chimel* v. *California*, 403 U.S. at 481.

In determining whether a search or seizure falls within one of the established exceptions to the warrant requirement, the burden is on the party claiming the exception to show that the circumstances permit an exception to the rule. This is not an arbitrary requirement. The Supreme Court has continually emphasized the importance of the constitutional requirement:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job

> is the detection of crime and the arrest of criminals. . . . And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *Chimel* v. *California*, 395 U.S. at 761, quoting from *McDonald* v. *United States*, 335 U.S. 451, 455-6 (1948).

To find that the seizure of Appellant's clothing was made incident to his arrest would require us to engage in the fiction that time was frozen for a period of ten hours or until the police could obtain substitute clothing. We hold that such a fiction is not permitted under the limited scope of the search incident exception. As the Supreme Court said in *Coolidge*, quoting from *Boyd* v. *United States*, 116 U.S. 616, 635 (1886):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against

any stealthy encroachments thereon." 403 U.S. at 454.

We determine that the seizure of Appellant's clothing was not conducted incident to his arrest.

It has been suggested that the warrantless seizure of Appellant's clothing was permitted because of the existence of some exigent circumstances. We are unable to determine, however, what those circumstances might be. The burden, of course, lies with Appellee to show the existence of exigent circumstances. "We cannot be true to [the] constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *McDonald* v. *United States*, 335 U.S. 451, 456 (1948); *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 455.

Appellant had been in custody for ten hours when his clothing was seized. He presented no danger to the police during this period. After substitute clothing had been purchased, it was not imperative that the clothing be seized without a warrant. Any additional time that would have been needed to obtain a warrant would have been very small in comparison with the period of time Appellant had already been in the jail. Nor is it likely that any additional time would even have been required, in view of the fact that ten hours had elapsed.

> "[T]he police must, whenever practicable, obtain judicial approval of searches and seizures through the warrant procedure, . . . and . . . [t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Chimel* v. *Cali-*

fornia, supra, 395 U.S. at 762; *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968).

We find no exigent circumstances existed which prevented the police from obtaining the necessary warrant.

One final consideration is whether Appellant could be held to have consented to the surrender of his clothing, as was the holding in *Clarke* v. *Neil*, 427 F.2d 1322 (6th Cir. 1970). We do not find that Appellant's status as a prisoner permits the inference that he consented to the removal of his clothing.

In view of the foregoing, we find that the seizure of Appellant's clothing was not made pursuant to any exception to the rule requiring that a warrant be obtained. We remand to the District Court with instructions to grant Appellant's motion to suppress the evidence obtained by the unlawful seizure of Appellant's clothing.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1218

[Filed April 11, 1973, James A. Higgins, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WILLIAM T. LIVESAY, DEFENDANT-APPELLANT

ORDER AND JUDGMENT

Before: CELEBREZZE, MILLER and KENT, Circuit Judges

This is an appeal from a conviction of attempted larceny of a Post Office in violation of 18 U.S.C. § 2115. We previously reversed the conviction of Appellant's co-defendant, Eugene Howard Edwards, on the basis that a seizure of his clothing was made without the necessary warrant having been obtained. *United States* v. *Edwards*, (No. 72-1219, March 8, 1973). The seizure of Appellant's clothing in this case rests on the same facts and we reverse for the reasons stated in the *Edwards* case.

We remand to the District Court with instructions to grant Appellant's motion to suppress the evidence obtained by the unlawful seizure of Appellant's clothing.

SO ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 72-1219

[Filed March 8, 1973, James A. Higgins, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

EUGENE HOWARD EDWARDS, DEFENDANT-APPELLANT

BEFORE: CELEBREZZE, MCCREE and LIVELY, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the case be remanded to the District Court with instructions to grant Appellant's motion to suppress.

No costs awarded inasmuch as this appeal is In Forma Pauperis.

Entered by order of the Court.

/s/ James A. Higgins
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1219

[Filed May 10, 1973, James A. Higgins, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

EUGENE HOWARD EDWARDS, DEFENDANT-APPELLANT

ORDER

BEFORE: CELEBREZZE, McCREE and LAVELN, Circuit Judges.

On consideration of the Plaintiff-Appellant's petition for rehearing and suggestion for rehearing en banc, no Judge of this Court having moved for rehearing en banc, and the petition having been referred, under the Court's Rules, for disposition by the panel which heard the case, the motion for rehearing is denied.

Entered by Order Of The Court

/s/ James A. Higgins
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-1218

[Filed May 10, 1976, James A. Higgins, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WILLIAM T. LIVERAY, DEFENDANT-APPELLANT

ORDER

Before: CELEBREZZE, MILLER and KENT, Circuit Judges.

On consideration of the Plaintiff-Appellant's petition for rehearing and suggestion for rehearing en banc, no Judge of this Court having moved for rehearing en banc, and the petition having been referred, under the Court's Rules, for disposition by the panel which heard the case, the motion for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-86

UNITED STATES OF AMERICA,
Petitioner,

vs.

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. AND THE NATIONAL SHERIFFS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

FRANK O. CARRINGTON, JR., ESQ.,
WAYNE W. SCHMIDT, ESQ.,
Americans for Effective Law Enforcement, Inc.,
Suite 950,
First National Bank Plaza,
1603 Orrington Avenue,
Evanston, Illinois 60201,
Counsel for Amici Curiae.

Of Counsel:
FRED E. INBAU, ESQ.,
RICHARD G. WRIGHT, ESQ.,
Americans for Effective Law Enforcement, Inc.,
GLEN MURPHY, ESQ.,
PAUL KELLER, ESQ.,
International Association of Chiefs of Police, Inc.,
Eleven Firstfield Road,
Gaithersburg, Maryland 20760,
COURTNEY A. EVANS, ESQ.,
National Sheriffs Association,
1250 Connecticut Avenue, N. W.,
Washington, D. C. 20036.

Gunthorp-Warren Printing Company, Chicago 6 338-1717

TABLE OF CONTENTS.

	PAGE
Table of Authorities	ii
Interest of Amici Curiae	2
Argument	
I. The Lower Court's Decision Is An Unrealistic and Hypertechnical Restriction Upon Proper Police Conduct and Should Be Reversed	4
A. This Court Does Now, and Should Continue To, Set For Lower Courts a Judicial Tenor of Commonsense and Realistic Interpretation of Police Conduct In the Enforcement of the Criminal Law	4
B. The Instant Case Calls for the Same Application of the Commonsense and Realistic Standards Which This Court Has In the Past Enunciated	6
C. A Significant Distinction Exists Between the Fourth Amendment Rights Of Person at Liberty and Of Persons Lawfully Incarcerated	10
D. The Decision of the Lower Court, If Upheld, Will Create Significant and Unnecessary Practical Problems For the Police	12
Conclusion	14

TABLE OF AUTHORITIES.

Cases.

Adams v. Williams, 407 U. S. 143 (1972) 5

Brinegar v. United States, 338 U. S. 160 (1949) 5

Cady v. Dombrowski, ... U. S. ....., 93 S. Ct. 2523 (1973) 5, 6

Carroll v. United States, 267 U. S. 132 (1925) 10

Chambers v. Maroney, 399 U. S. 42 (1970) 9, 10

Coolidge v. New Hampshire, 403 U. S. 443 (1971) 11

Cupp v. Murphy, ... U. S. ....., 93 S. Ct. 2000 (1973) 5, 7

Lanza v. New York, 370 U. S. 139 (1962) 11

Miranda v. Arizona, 384 U. S. 436 (1966) 7

Orozco v. Texas, 394 U. S. 324 (1969) 7

Schneckloth v. Bustamonte, ... U. S. ....., 93 S. Ct. 2041 (1973) 5

United States v. Caruso, 385 F. 2d 184, CA2 (1966)..... 8

United States v. Harris, 403 U. S. 573 (1971) 5

United States v. Hitchcock, 467 F. 2d 1107, CA9 (1972) 12

United States v. Manar, 454 F. 2d 342, CA7 (1972)..... 10

United States v. Palmateer, 469 F. 2d 273 (1972)..... 12

United States v. Ventresca, 380 U. S. 102 (1965) 5

United States v. Williams, 416 F. 2d 4, CA2 (1969)..... 8

Books.

Scientific Evidence in Criminal Cases, Moenssens, Moses, and Inbau, Foundation Press (1973) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-88

UNITED STATES OF AMERICA,

Petitioner,

vs.

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. AND THE NATIONAL SHERIFFS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Solicitor General of the United States, counsel for the Petitioner, and by Mr. Thomas R. Smith, Esq., counsel for the Respondents. Letters of consent of both parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the state of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) represents over 5,000 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct. With regard to police professionalism law-related activities, the IACP, in 1970 formed the Police Legal Center of the IACP. This center serves as a hub for legal activities affecting police work, it coordinates the activities of Police

Legal Advisors and Police Legal Units, nationwide, and publishes numerous periodicals, documents, and in-service legal training materials for use both by police officers and executives.

The National Sheriffs' Association is a non-profit, professional organization with nearly 35 years of progressive assistance to federal, state, and local law enforcement, court, corrections, and other criminal justice agencies. Its more than 33,000 members in all states and several foreign nations include not only the 3099 sheriffs of America but also encompass other criminal justice administrators and practitioners at virtually every level of jurisdiction.

The NSA conducts, frequently in conjunction with colleges and universities, scores of educational, training, and informative conferences, seminars, and courses each year. The Association has conducted nationwide crime prevention programs and has worked with state and local governments in promulgating mutual aid concepts and contracts for more effective enforcement of the laws.

The interest of *amici* in the instant case stems from the importance of the issues involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement. The question directly at issue—whether or not police officers must procure a search warrant to remove the clothes of a lawfully incarcerated suspect some hours after his incarceration—raises important legal and practical problems for police officers nationwide. *Amici* believe however that there is an overriding policy issue here: the question of what standards this Court will mandate for lower courts in their determination of search and seizure cases involving law enforcement officers. This is the issue to which *amici* will address ourselves and wherein our interest lies.

ARGUMENT.

I.

THE LOWER COURT'S DECISION IS AN UNREALISTIC AND HYPERTECHNICAL RESTRICTION UPON PROPER POLICE CONDUCT AND SHOULD BE REVERSED.

As is our custom when appearing as *amici* before this Court, we will not reiterate at any length the legal arguments made by the Government in this case, although we are in complete agreement with such arguments and wish to associate ourselves with and express our complete support for them. *Amici* will, rather, address ourselves to the important policy issues raised by this case and to the importance of such issues to the effectiveness of law enforcement, nationwide.

A.

This Court Does Now, and Should Continue To, Set for Lower Courts a Judicial Tenor of Commonsense and Realistic Interpretation of Police Conduct in the Enforcement of the Criminal Law.

Any case which this Court hears is, by definition, an important one because, at least in issues of Constitutional dimension, every lower court in the country is, of course, bound by the rulings of this Court. There is a broader area of importance associated with cases such as this, however, because, in addition to making definitive and controlling rulings on a case-by-case basis, this Court sets a *tenor of jurisprudence* for lower courts which transcends its holdings in individual decisions.

In no area is this tenor more important than that involving the conduct of the police in the enforcement of the criminal law. Just as lower courts are bound by the Court's holdings, the 400,000 plus law enforcement officers, who are responsible to

the lower courts, are intimately affected not only by this Court's holdings in individual cases, but by the *overall* impact of those holdings as they are viewed by the lower courts.

There are basically two ways in which courts can interpret police actions: either in a hypertechnical and unrealistic manner in which the slightest judgment error by an officer in such an incredibly complicated area as search and seizure law will be held cause for the suppression of evidence and the reversal of a conviction; or, in a common-sense manner in which the realities of law enforcement work are taken into consideration and the bases of review of police conduct are ". . . the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949).

This Court has, in recent years, followed the latter approach, setting a tenor of commonsense and realistic review of police conduct for lower courts. In *United States* v. *Harris*, 403 U. S. 573 (1971), the Court upheld an affidavit for search warrant, which the lower court had found insufficient by applying what the Chief Justice, writing for the majority, characterized as ". . . the very sort of hypertechnicality—the elaborate specificity once exacted under common law—condemned by this Court in *Ventresca*," 403 U. S. 573 at 579. Likewise in *Adams, Warden* v. *Williams*, 407 U. S. 143 (1972) this Court reversed the holding of the United States Court of Appeals for the Second Circuit, that information from a known but untested informant was insufficient to justify a *Terry*-type "stop and frisk."

Only last term this Court applied commonsense standards to sustain searches and seizures in three cases: *Cupp* v. *Murphy*, ... U. S. ...., 93 S. Ct. 2000 (1973) (the taking of fingernail scrapings, without a warrant, from a murder suspect who was not then under arrest); *Schneckloth* v. *Bustamonte*, ... U. S. ...., 93 S. Ct. 2041 (1973) (holding that the voluntariness of a consent to search is a fact to be determined from the totality of the circumstances); and *Cady* v. *Dombrowsky*, ...

U. S. . . . ., 96 S. Ct. 2523 (1973) (upholding the warrantless search of an automobile at a time after it has been impounded and placed in a garage).

In each of these cases the lower courts used rather rigid, technical standards to find the police conduct in question illegal, in effect refusing to consider the practicalities of police work. In each case this Court reversed and upheld the searches involved by applying commonsense standards to the law enforcement activities in question without doing damage to the *fundamental* rights guaranteed to every citizen by the Constitution, which rights this Court has been vigilant to protect. This is what we mean by the "tenor of jurisprudence" which is set by this Court for lower courts, and which we consider to be as important as the holdings in the individual cases.

B.

The Instant Case Calls for the Same Application of the Commonsense and Realistic Standards Which This Court Has in the Past Enunciated.

This commonsense approach—this balancing of the rights of society against those of the criminal accused—is, we believe, called for in the instant case. In our view, the lower court in this case applied hypertechnical standards in the extreme by holding illegal the taking, for scientific examination, of the clothes of a suspect who had lawfully been incarcerated, some ten hours after his incarceration. We believe that the commonsense and realistic evaluation taken by this Court in the cases cited above should be applied to the instant case, both as to the facts of the case itself and to continue the tenor of such an approach to police conduct which this Court has evidenced in recent years.

We should state at the outset that we believe that the gravity of the instant case transcends the crime involved therein: a post office burglary. While burglary is, without question, a serious

crime, the issue raised, the search of the person of one lawfully incarcerated, will often arise in more serious crimes such as murder and rape; for it is precisely the sort of minute physical evidence—hairs; fingernail scrapings; blood, saliva and semen stains; traces of dust and earth; etc. which will be involved in violent crimes against persons.[1] Additionally, we point out that this Court's restrictions upon the police in obtaining legally admissible confessions from criminal suspects have made the use of scientific evidence extremely important in the solution and successful prosecution of criminal cases.[2]

We turn now to the characterization of the lower court that the police conduct in the instant case was "unreasonable." Surely it is patent that there was no egregious or wilful misconduct on the part of the police. They were made aware of a break-in at the Lebanon, Ohio Post Office late on a Sunday night and lawfully arrested the suspects, respondents herein, shortly thereafter. Photographs were taken of the site of the break-in that night, after the break-in was discovered, and then the officers apparently went home to bed, planning to continue their investigation in the morning. This they did. The next morning paint scrapings were taken from the scene of the break-in and sent to the laboratory for analysis. The police also purchased new clothes for the suspects and took, without a warrant, the suspects' original clothing for laboratory analysis to determine if there were paint samples on the clothes which could be matched to those taken at the scene. (Trial Transcript, page 343) The record indicates that the officers acted in complete good faith.

Clearly this is not the sort of case where the police should have been aware that their actions in taking, without a warrant, the clothes of the incarcerated prisoners would be held to be "unlaw-

1. cf. *Cupp* v. *Murphy*, (*supra*). See generally: "Scientific Evidence in Criminal Cases" by Moenssens, Moses, and Inbau, Foundation Press, 1973.

2. *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Orozco* v. *Texas*, 394 U. S. 324 (1969).

ful." At least two United States Circuit Courts of Appeal had previously sanctioned such conduct: the Second Circuit in *United States* v. *Caruso*, 385 F. 2d 184, (1966) and the Fifth Circuit in *United States* v. *Williams*, 416 F. 2d 4, (1969). It is highly unlikely that the Lebanon, Ohio police officers had heard of either case at the time that they took respondent's clothing, but the fact that *Caruso* and *Williams* had been decided indicates beyond any doubt that the searches involved were not encompassed by an area of the law so settled that the officers would be chargeable with knowledge of the "illegality" of their acts.

Additional evidence that the police were acting in good faith may be found in the fact that, on the morning after the break-in, they procured a search warrant for the automobile in which one of the suspects was arrested the prior evening. (Transcript of Motion To Suppress at pages 101, 155-157, 161-162) Had the officers had any idea that a search warrant was necessary for the seizure of the clothing from the prisoners in jail, they could have easily procured one. This case appears to us to be a clear example of police officers who were making every attempt to comply with the law but who were "second guessed" by the hypertechnical interpretation placed upon their conduct by the lower court.

Thus, it is apparent that the officers' conduct in the instant case was neither (a) egregious or wilful; nor (b) the sort of conduct which they should have *known* was clearly prohibited, as would have been the case if they had arrested the respondents on bare suspicion, locked them up and taken their clothes. The question remains, then, was their conduct, despite this lack of knowledge, as "unreasonable" as the lower court held it to be?

We believe not. The respondents had already been arrested and were lawfully in jail. The invasion of their privacy was already about as complete as it could be and we do not see how the taking of their clothes without a warrant some hours after

their incarceration can be held to be an invasion of a Constitutionally protected right.[3]

The situation here is basically analogous to the theory used by this Court to sustain the warrantless search of an automobile, at the police station to which it had been transported, some hours after it had been stopped and its occupants arrested, *Chambers* v. *Maroney*, 399 U. S. 42, (1970). Mr. Justice White, writing for the majority of the Court in *Chambers*, found that the police had probable cause to search the car when it was stopped on the road and its occupants were arrested. He then found the later, warrantless search at the police station proper because:

> For constitutional purposes we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. 399 U. S. at 52.

In the instant case the primary invasion of respondents' privacy—their being lawfully taken into custody—had already taken place. Like the automobile in *Chambers*, they had been seized, with probable cause, and a complete search of their persons at the time of their arrest, including the taking of his clothes, would have been lawful at that time. By analogy to *Chambers*, the subsequent taking of their clothes, probable cause still existing, should be equally lawful.

---

3. This is not to say that there could not be cases in which an incarcerated person would have a right to court process before physical evidence was taken from him. Invasions of the body, for instance the probing for a bullet believed to have been fired into the suspect, might well have to be done only upon court order; but here the only removal was of respondents' outer clothing.

C.

A Significant Distinction Exists Between the Fourth Amendment Rights of Persons at Liberty and of Persons Lawfully Incarcerated.

This is the point at which the analogy between the automobile in the case of *Chambers* v. *Maroney* (supra) and persons of the suspects in the instant case brings into focus the "hypertechnical and unrealistic" vs. the "commonsense and realistic" dichotomy involved in interpreting the reasonableness of police conduct. There appears to be no doubt that, had the police taken respondents' clothing at the time of their arrest and booking, there would be no question of the lawfulness of the taking. (*United States* v. *Manar*, 454 F. 2d 342, CA7, (1972) and cases cited therein). If the right to take the clothing without a warrant of the suspects, who were already in jail, existed at one point in time, we believe that only the most tortured and technical interpretation of the Fourth Amendment's protection would lead to the conclusion that the *same clothes* could not be taken from the *same suspects, who were still in jail* on the original charge which lodged them there.

The analogy between the search of a vehicle and of a person can be carried one step farther at this point. This Court has always held that the rules governing the search of automobiles are far more flexible in cases dealing with automobiles than in cases dealing with searches of dwellings. *Carroll* v. *United States*, 267 U. S. 132 (1925). This is so because vehicles, because of their moveable nature, make much easier the disposition or removal of evidence.

We submit that evidence of a physical nature concealed, whether knowingly or unknowingly, on the person of a suspect is far more capable of easy disposal than that contained in a moveable vehicle. A vehicle at least requires someone to drive it away and there are many places to which a person can go that a vehicle can not. In the instant case it is true that re-

spondents were locked in a jail cell, but, had it occurred to them, they could have shaken their clothing out, soaked them in a toilet or even obtained matches for the ostensible purpose of smoking cigarettes and burned the clothes in order to remove any physical evidence against them.[4] In short, viewed realistically, the mere presence of physical evidence of a crime on the person of a suspect creates in many cases an exigency similar to, if not greater than, that used to justify warrantless searches of vehicles.

Clearly, had the respondents been released on bond and left the jail, the police would then have needed a search warrant to take the clothes from the suspects either in person or from their dwelling. But this is simply not the case here. Respondents *were* still in jail and the lower court's requirement of a warrant to take their clothes erects a constitutional barrier around persons lawfully incarcerated which has not been sanctioned by this Court before. (See, e.g. *Lanza* v. *New York*, 370 U. S. 139 (1962), ". . . a jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room", 370 U. S. 139 at 143.)

The United States Court of Appeals for the Ninth Circuit in two recent cases, has held that there is no Fourth Amendment

4. This is the sort of exigency which we believe distinguishes the instant case from the holding of this Court in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971). In *Coolidge* the warrantless search of the defendant's car, parked at his house, was held to be unlawful; however, in that case Coolidge was in jail, his wife was miles away in the company of police officers and the Coolidge property was under guard, thus for all intents and purposes the vehicle was immobilized. In the instant case the evidence was *on the persons* of respondents and, despite the fact that they were in a jail cell, the evidence was readily available to them for disposal had one of them suddenly remembered the fact that scientific investigation techniques such as the examination and analysis of paint samples had been used by the police in past cases. The exigency, at least in the minds of the police, which is raised by these facts becomes even more important when it is considered that the police did not decide to take paint scrapings from the crime scene until the morning after the arrests were made; they then seized the suspects' clothing the same morning.

bar to the warrantless search of the cell of someone lawfully incarcerated; *United States* v. *Hitchcock*, 467 F. 2d 1107 (1972), cert. den. 410 U. S. 916; *United States* v. *Palmateer*, 469 F. 2d 273 (1972). In *Hitchcock* the court held specifically that a prisoner has no reasonable expectation of privacy in his cell, 467 F. 2d 1108. We believe that the same commonsense rationale should apply to the taking of the suspects' clothing in the instant case.

As we have noted, the argument can be made that the mere presence of disposable evidence on the person of respondents created an exigency which, analogous to the case of automobiles, would permit the warrantless taking of their clothes. Even assuming that no such exigency existed, the minimal invasion involved in taking respondents' clothes when they were lawfully incarcerated in the first place and had no reasonable expectation of privacy in their cell (see, *U. S.* v. *Hitchcock*, *supra*), can not, by any realistic and commonsense standard, be held to be a constitutional violation warranting a reversal of their convictions.

D.

The Decision of the Lower Court, If Upheld, Will Create Significant and Unnecessary Practical Problems for the Police.

The lower court's unrealistic holding in the instant case could, if taken to its logical conclusion, cause innumerable practical problems for law enforcement officers and jailers alike. When, for example, does the mantle of the Fourth Amendment's warrant clause protection fall about the shoulders of the prisoner? When he leaves the booking desk? After he has been in jail for an hour? Two hours Eight hours? Additionally, under the lower court's ruling, must police officers or jailers procure a search warrant every time they wish to search the person or cell of an incarcerated prisoner and no demonstrable exigency exists? These are very real practical problems which, we submit, the lower court ignored and which this Court should consider.

We do not contend for a moment that persons in jail or prisons should have no rights at all. Obviously they should be protected from beatings and other inhumane treatment, from "third degree" methods of questioning and even from completely arbitrary searches of their persons or living areas when such searches are made solely for harassment purposes. But where, as in the instant case, the police have criminal suspects incarcerated in lawful custody and where there is probable cause to believe that their clothes contain evidence of the crime for which they were arrested, we believe that the warrant requirement imposed by the lower court in this case constitutes a hypertechnical restriction upon legitimate police conduct (and which would in this case in all likelihood require the freeing of two convicted burglars) which adds nothing to the fundamental freedom from truly unlawful search and seizure which is embodied in the Fourth Amendment.

We urge the Court to reverse in this case and to continue its judicial tenor of reasonable and commonsense standards of interpretation of police conduct.

CONLUSION.

The efforts of law enforcement officers nationwide to deal with the problems of crime and lawlessness are, quite properly, under constant scrutiny by lower courts across the nation. This scrutiny takes place in a tenor of jurisprudence set for the lower courts by this Court. This tenor has of late been towards a commonsense and realistic approach to the interpretation of police conduct. The instant case provides a vehicle to continue this trend. The lower court applied a technical and unrealistic interpretation to the actions of the police officers when it held that a search warrant was required to take the clothes for scientific examination, of two lawfully incarcerated suspects some hours after their incarceration. We do not believe that, in a case such as this, such an interpretation was constitutionally warranted and we urge this Court to reverse.

Respectfully submitted,

FRANK G. CARRINGTON, JR., ESQ.,
WAYNE W. SCHMITT, ESQ.,
Americans for Effective Law Enforcement, Inc.,
Suite 960,
State National Bank Plaza,
1603 Orrington Avenue,
Evanston, Illinois 60201,
Counsel for Amici Curiae.

Of Counsel:
FRED E. INBAU, ESQ.,
RICHARD O. WRIGHT, ESQ.,
Americans for Effective Law Enforcement, Inc.,
GLEN MURPHY, ESQ.,
PAUL KELLER, ESQ.,
International Association of Chiefs of Police, Inc.,
Eleven Firstfield Road,
Gaithersburg, Maryland 20760,
COURTNEY A. EVANS, ESQ.,
National Sheriffs Association,
1250 Connecticut Avenue, N. W.,
Washington, D. C. 20036.

No. 73-88

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER
v.
EUGENE H. EDWARDS AND WILLIAM T. LAVEMAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
EDWARD S. SMITH,
Assistant to the Solicitor General,
JEROME M. FEIT,
VICTOR E. STONE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision involved	2
Statement	2
Summary of argument	5
Argument:	
The Fourth Amendment does not require that a warrant be obtained to search the person of one lawfully under arrest and in custody, simply because the search does not occur contemporaneously with the arrest	7
A. The historical background of the Fourth Amendment and modern practice provide no basis for the ruling below	8
B. The fact that the search in this case occurred some hours after the arrest did not bring into play the warrant requirement of the Fourth Amendment	15
C. The decision below defeats rather than fosters Fourth Amendment values	21
Conclusion	24

CITATIONS

Cases:	
Abel v. *United States*, 362 U.S. 217	19
Almeida-Sanchez v. *United States*, No. 71-6278, decided June 21, 1973	14
Boyd v. *United States*, 116 U.S. 616	8
Cady v. *Dombrowski*, No. 72-556, decided June 21, 1973	17
Carroll v. *United States*, 267 U.S. 132	20
Chambers v. *Maroney*, 399 U.S. 42	17, 20, 21
Charles v. *United States*, 278 F. 2d 886, certiorari denied, 364 U.S. 831	18

837-424—73——1

Cases—Continued — Page

Chimel v. *California*, 395 U.S. 752 ..... 8, 10, 15, 16, 17, 20
Coolidge v. *New Hampshire*, 403 U.S. 443 ..... 15, 15–16, 21
Cotton v. *United States*, 371 F. 2d 385 19
Dillon v. *O'Brien and Davis*, 16 Cox Crim. Cas. 245, 20 L.R. Ir. 300 11
Elias v. *Pasmore*, 2 K.B. 164 12
Entick v. *Carrington*, 19 How St. Tr. 1029 11
Frank v. *Maryland*, 359 U.S. 360 8
Harris v. *United States*, 331 U.S. 145 ..... 8, 17
Johnson v. *United States*, 333 U.S. 10 10
Lanza v. *New York*, 370 U.S. 139 18
McDonald v. *United States*, 335 U.S. 451 ..... 10, 17
Malone v. *Crouse*, 380 F. 2d 741, certiorari denied, 390 U.S. 968 19
Marcus v. *Search Warrant*, 367 U.S. 717 8
Preston v. *United States*, 376 U.S. 364 17
Rodgers v. *United States*, 362 F. 2d 358, certiorari denied, 385 U.S. 993 19
Schmerber v. *California*, 384 U.S. 757 16
Shelton v. *United States*, 404 F. 2d 1292 19
Stanford v. *Texas*, 379 U.S. 476 ..... 8, 9
Terry v. *Ohio*, 392 U.S. 1 ..... 5, 8, 22
United States v. *Caruso*, 358 F. 2d 184, certiorari denied, 385 U.S. 862 ..... 4, 23
United States v. *DeLeo*, 422 F. 2d 487, certiorari denied, 397 U.S. 1037 ..... 16, 19
United States v. *Gonsales-Perez*, 426 F. 2d 1283 19
United States v. *Manar*, 454 F. 2d 342 19
United States v. *Simmons*, 302 A. 2d 728 13
United States v. *Williams*, 416 F. 2d 4 4
Weeks v. *United States*, 232 U.S. 383 ..... 5–6, 8

Constitution and statutes:

United States Constitution, Fourth Amendment 2, 4, 5, 6, 7, 8, 16, 21
18 U.S.C. 2115 2
18 U.S.C. 4208(a)(2) 3

Miscellaneous:

10 *Halsbury's Laws of England* (3d ed. Simonds, 1955) 11
2 Pollock & Maitland, *The History of English Law* (2d ed. 1898) 11
Taylor, *Two Studies in Constitutional Interpretation* (1969) 10

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-88

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *Edwards* (Pet. App. A, pp. 1a-15a) is reported at 474 F.2d 1206. The court of appeals did not write an opinion in *Livesay*, but entered an order (Pet. App. B, p. 16a) reversing the judgment of conviction on the basis of its opinion in *Edwards*.

JURISDICTION

The judgment of the court of appeals in *Edwards* (Pet. App. C, p. 17a) was entered on March 8, 1973, and in *Livesay* (Pet. App. B, p. 16a) on April 11, 1973. Timely petitions for rehearing with suggestion

for rehearing *en banc* were denied on May 10, 1973 (Pet. Apps. D and E, pp. 18a, 19a). On May 31, 1973, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including July 9, 1973. The petition was filed on that date and was granted on October 9, 1973 (A. 36). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fourth Amendment requires that a search warrant be obtained to seize an accused's clothing, after he has been arrested on probable cause and while he is being held in custody, when there is cause to believe that the clothing contains evidence of his complicity in the offense of which he is accused.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Ohio, respondents were convicted of attempting to break and enter a United States Post Office, in violation of 18 U.S.C. 2115. Both were sentenced to five year terms of im-

prisonment, with possibility of early parole under 18 U.S.C. 4208(a)(2).

The relevant facts are recounted in the opinion of the court of appeals (Pet. App. A, pp. 1a–3a). They show that shortly after 11:00 p.m. on May 31, 1970, respondents were lawfully arrested and charged with attempting to break into the Lebanon, Ohio, post office. Respondent Edwards was arrested with a companion as he walked away from the post office (*id.* at 2a); respondent Livesay was arrested as he was hiding in a nearby automobile (A. 4–5, 17). The two were then transported to the local jail and placed in separate cells (A. 13, 18, 28, 32).

Later that evening an investigation by local police authorities revealed that the attempt to enter the post office had been made through a window on the north side of the building. A heavy metal mesh screen around the window had been broken and bent inward; the wooden window appeared to have been forced up with a pry bar, and there were paint chippings on the windowsill (A. 9–10, 12, 14, 26–27). Various items of evidence, including a pry bar, were collected, and the window was photographed (A. 11, 12); the automobile in which Livesay had been arrested was impounded (A. 2, 5).

On the following morning, the investigation "started where [the officers] had left off the night before" (A. 20). Paint samples were taken from the window (A. 31), a warrant was obtained to search the automobile (A. 4–5), and trousers and T-shirts were purchased for respondents (A. 20, 33), who were still dressed in the clothing which they had been wearing at

the time of their arrest (Pet. App. A, p. 3a). At the officers' request, respondents turned over their shoes, trousers, shirts, and a sweater and donned the new clothing (A. 19–20, 25–26, 30). Scientific examination of paint traces found on respondents' clothing and comparison of those traces with paint chips taken from the damaged post office window showed that both samples came from the same source (A. 24, 34–35).

2. After an evidentiary hearing, the district court overruled respondents' motion to suppress the results of the examination of the paint chips (A. 1). On appeal following conviction, the court of appeals reversed. Expressly rejecting the contrary holdings of two other courts of appeals[1] (Pet. App. A, p. 10a), the court below held that where law enforcement officers do not search and seize all personal effects immediately after an arrest, a subsequent warrantless seizure from the arrestee violates the Warrant Clause of the Fourth Amendment. The court held that "a search cannot be incident to an arrest after the administrative process and the mechanics of the arrest have come to a halt and the prisoner is in jail. At this point, the justifications for the 'search incident' exception no longer exist" (*ibid.*). Therefore, it concluded that, although respondents' arrest was lawful and probable cause existed for the seizure of the clothing, the failure of the police officers to obtain a warrant rendered the search of the clothing unlawful

[1] *United States* v. *Williams*, 416 F.2d 4 (C.A. 5); *United States* v. *Curzie*, 358 F.2d 184, 185–186 (C.A. 2).

and required suppression of the evidence derived therefrom.

SUMMARY OF ARGUMENT

The history and evolution of the Warrant Clause of the Fourth Amendment show that it was principally directed to ensuring the privacy of the home and similar places against unrestricted searches and seizures. The clause mandates specificity of purpose for a search and interposes a detached magistrate between the police and the privacy of a citizen's home.

On the other hand, the acceptance of warrantless searches of arrestees after arrest evolved in an entirely different historical context. Such searches involved none of the abuses which troubled the Framers of the Warrant Clause. The only victims of such searches were those who were either caught in the act of committing a crime, or were the objects of hue and cry or an arrest warrant. Accordingly, it was early concluded that the privacy of an individual at the time of a search of his person incident to an arrest was sufficiently protected by the requirement for probable cause underlying his arrest, and such lawful restraint and incidental search were not considered to entail the kind of wholesale and wide-ranging invasion of privacy for which the Framers considered a warrant requirement appropriate.

The law is clear, therefore, that after the arrest of a defendant, law enforcement officers may undertake "a relatively extensive exploration of the person," not only for concealed weapons but for evidence which he may have in his possession. *Terry* v. *Ohio*, 392 U.S. 1, 25; *Weeks* v. *United States*, 232 U.S.

383, 392. Moreover, because of the limited privacy interests that attach in such circumstances, it is not necessary to justify a warrantless post-arrest search of the person of the arrestee by a showing that evidence obtained thereby was otherwise in danger of being destroyed.

The fact that a post-arrest search does not take place "contemporaneous[ly] with and [is not] confined to the immediate vicinity of the arrest" (Pet App. A, p. 8a) is basically irrelevant to the considerations which underly the Warrant Clause. The contrary holding of the court of appeals resulted from its mistaken reliance on cases involving efforts by law enforcement officers to undertake extensive searches of a defendant's home and surrounding premises, simply because he was arrested there. There is, however, a substantial distinction between such searches and the minimal additional intrusion which a post-arrest search of an individual in a police station involves.

The search and seizure of respondents' clothing for evidence of their participation in the offense concededly did not offend the Fourth Amendment's general proscription against unreasonable searches and seizures. Respondents were arrested at the scene of the crime and under circumstances which justified the belief that they had attempted to break into the post office. There was, as the court of appeals found, probable cause to believe that an examination of their clothing would lead to the discovery of highly probative evidence. The conduct of the law enforcement officers who made the post-arrest seizure of the clothing did not, moreover, involve any overreaching or use of force or coercion.

While it is true that the law enforcement officers here had no reason to believe that respondents were aware of the damaging evidence on their clothing and thus had no reason to fear that this evidence would be destroyed, this fact alone does not justify the conclusion that a warrant was required, since the historic basis for the post-arrest exception to the Warrant Clause does not rest alone on this consideration. But even if it did, the cases recognize that where, because of exigent circumstances, a search could have been made without a warrant at the time of arrest, a search at a later time, when such exigent circumstances are no longer present, is nevertheless justified without a warrant.

Finally, we submit that the likely effect of an extension of the Warrant Clause to non-contemporaneous searches will be to encourage more extensive searches and seizures at the time of arrest, rather than to encourage resort to a magistrate. Such a holding would thus defeat rather than foster the privacy values embodied in the Fourth Amendment. Reasonableness should be the governing standard for police evidentiary searches of jailed suspects.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT REQUIRE THAT A WARRANT BE OBTAINED TO SEARCH THE PERSON OF ONE LAWFULLY UNDER ARREST AND IN CUSTODY, SIMPLY BECAUSE THE SEARCH DOES NOT OCCUR CONTEMPORANEOUSLY WITH THE ARREST

It is incontestible that, after a lawful arrest, law enforcement officers may conduct "a relatively extensive exploration of the person" without a search warrant, not only for concealed weapons but for evidence. *E.g.*,

Terry v. *Ohio*, 392 U.S. 1, 25; *Weeks* v. *United States*, 232 U.S. 383, 392. As this Court observed in *Chimel* v. *California*, 395 U.S. 752, 755, there is a right "always recognized under English and American law to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime."

While the court of appeals recognized this established principle, it deemed it inapplicable to this case because the seizure was not "substantially contemporaneous with and confined to the immediate vicinity of the arrest" (Pet. App. A, p. 8a). It held that in the circumstances here—a search at the jailhouse occurring some ten hours after the arrest—the search and seizure could be justified only under a warrant. This ruling is at odds with the history of the Fourth Amendment and interposes a warrant requirement where the values that the warrant requirement are meant to preserve do not require it.

A. THE HISTORICAL BACKGROUND OF THE FOURTH AMENDMENT AND MODERN PRACTICE PROVIDE NO BASIS FOR THE RULING BELOW

The Warrant Clause was never intended to apply to searches and seizures such as are involved in the instant case. The history and evolution of the Fourth Amendment have been well-documented in the decisions of the Court,[1] and there is no need to repeat this material at length here. Suffice it to say that this Court has stated

[1] See, e.g., *Stanford* v. *Texas*, 379 U.S. 476, 481–485; *Marcus* v. *Search Warrant*, 367 U.S. 717, 724–729; *Frank* v. *Maryland*, 359 U.S. 360; *Harris* v. *United States*, 331 U.S. 145, 157–161 (dissent); *Boyd* v. *United States*, 116 U.S. 616, 624–630.

that the Warrant Clause "was most immediately the product of contemporary revulsion against a regime of writs of assistance." *Stanford v. Texas*, 379 U.S. 476, 482. As the Court further pointed out in *Stanford*:

> * * * Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer." * * * [379 U.S. at 481.]
>
> * * * In an opinion which this Court has characterized as a wellspring of the rights now protected by the Fourth Amendment, Lord Camden declared the [general] warrant to be unlawful. "This power," he said, "so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper." *Entick v. Carrington* [19 How. St. Tr. 1029, 1064]. Thereafter, the House of Commons passed two reso-

> lutions condemning general warrants, the first limiting its condemnation to their use in cases of libel, and the second condemning their use generally. [379 U.S. at 484; footnotes omitted.]

In short, the Warrant Clause was adopted to eliminate unrestricted invasions of homes, places of business, and similar areas, except with the protection of intervening judicial authority. The clause mandates specificity of purpose for a search and interposes a detached magistrate between the police and the privacy of a citizen's home. "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. * * * And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." *McDonald* v. *United States*, 335 U.S. 451, 455–456; *Chimel* v. *California*, 395 U.S. 752; *Johnson* v. *United States*, 333 U.S. 10, 14.

On the other hand, warrantless searches of the person of an arrestee after his lawful arrest evolved in an entirely different historical context. As Professor Telford Taylor points out in *Two Studies in Constitutional Interpretation* 30 (1969), "arrest searches involved none of the abuses against which Otis and Camden railed. The only victims of such searches were those who, as probable felons, were the objects of hue and cry, hot pursuit, or an arrest warrant," and it was accepted that "their persons [should] be subject to search for the fruits of their crimes, or the wea-

pons, clothes or other objects that might identify them as felons * * *."[1]

Indeed, the English cases carefully distinguish, as do our own, a search of the person of the arrestee from a search of a home under general warrant, such as had occurred in *Entick* v. *Carrington*, *supra*. In *Dillon* v. *O'Brien and Davis*, 16 Cox Crim. Cas. 245, 249–251, 20 L.R. Ir. 300, 316–319 (1887), Pates, C.B., commenting on the right to search the person of an arrestee incident to an arrest, stated:

> * * * [I]t is clear and beyond doubt, that, at least in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime. [And see, 10 *Halsbury's Laws of England* 356 (3d ed. Simonds, 1955).] * * * Its purpose and object, viz., to produce the goods in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law. * * * In [*Entick* v. *Carrington*] there was no allegation of the plaintiff's guilt, nor that there was reasonable or probable

[1] "The old rule held good that if by hue and cry a man was captured when he was still in mirin of his crime—if he was still holding the grey knife or driving away the stolen beasts * * * he could not be heard to say that he was innocent * * *." 2 Pollock & Maitland, *The History of English Law* 579 (2d ed. 1898).

cause for believing him guilty, nor that a crime had, in fact, been committed by anyone, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing might be evidence of) a crime committed by him or anyone else. The nature of the question there is shown by the statement of Lord Camden that "If this point should be determined in favour of the jurisdiction, the secret cabinets and bureaux of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." Lord Camden takes pains to show that the word "papers" in the warrant could not, in point of law, be restrained to libellous papers only, and he adds: "All the papers and books, without exception, if the warrant be executed according to its tenor, must be seized and carried away, for it is observable, that nothing is left either to the discretion or to the humanity of the officer." * * * For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension, as distinguished from general warrants to seize all papers. * * *

Accord, *Elias* v. *Pasmore*, 2 K.B. 164, 172 (1934).

Thus, both in the United States and in England, it was early concluded that invasion of the privacy of an individual at the time of a search of his person in-

cident to an arrest was fully justified by the probable cause underlying his arrest, and that such a lawful restraint and incidental search was not the kind of wholesale and wide-ranging invasion of privacy about which Lord Camden and the Framers of the Warrant Clause were concerned. A warrantless post-arrest search of an arrestee is justifiable "not because the protections of the Constitution become any less meaningless after an arrest * * * but because the definition of that which is 'unreasonable' under the Fourth Amendment is altered significantly when a valid arrest has been made." *United States* v. *Simmons*, 302 A. 2d 728, 730 (D.C. Ct. App.).

In sum, the foregoing historical analysis suggests that the Warrant Clause was never intended to have the consequence that any search or seizure, of whatever kind, would necessarily have to be supported by a warrant (unless falling within certain narrowly defined exceptions), even though fully reasonable in nature and extent and supported by probable cause. As further discussed below, the cases in which this Court has recognized a warrant requirement, notwithstanding reasonableness and probable cause, have involved searches of houses, business premises, or the like[1]—reflecting a recognition that the nature of the intru-

[1] The status of automobiles is somewhat uncertain. While *Coolidge* v. *New Hampshire*, 403 U.S. 443, involved application of the warrant requirement to the seizure of an automobile, it was held to be significant that the automobile was physically situated on private property, which had to be entered in order to effect the seizure (see 403 U.S. at 465, n. 20).

sion was such as to demand the interposition of a neutral and detached magistrate between the citizen and the police. The warrant requirement has also been suggested as being applicable to non-probable cause, but reasonable, stops and searches of vehicles on the highway. *Almeida-Sanchez* v. *United States*, No. 71-6278, decided June 21, 1973, slip op., pp. 5-11 (Powell, J., concurring). In the circumstances of the instant case, by contrast, we are not dealing with the kind of important privacy interest respecting which the warrant requirement was ever intended, has ever been held by this Court, or ought reasonably be held to apply.[1]

---

[1] The question whether a warrant requirement ought automatically be attached to every kind of search and/or seizure, regardless of surrounding circumstances, unless one of the traditional exceptions applies, is also presented to the Court (in a different factual context, involving a much lesser intrusion, but in the absence of probable cause) in our pending petition for certiorari in *United States* v. *Gray*, No. 73-706.

It might be suggested that the difference between the proposition for which we here contend (the inapplicability *vel non* of the warrant requirement to certain types of searches and seizures) and the traditional approach (entailing the identification and elaboration of various exceptions to a generally applicable warrant requirement) is one of semantics only. Indeed, the lines of distinction are blurred by the facts of this very case—as we show in the ensuing argument, the admissibility of the evidence is clear under conventional analysis. We believe, nevertheless, that there are many circumstances in which the distinction is significant and the approach we here suggest permits the correct result to be reached by a better reasoned and more direct line of analysis. *United States* v. *Gray*, *supra*, where law enforcement officers briefly examined weapons found during the course of an otherwise lawful search of Gray's home, may present such a case. The weapons were not the object of the search, nor were they described in the warrant. The court of appeals, rather than examining the nature of the intrusion in light of the considerations which underlie the warrant require-

B. THE FACT THAT THE SEARCH IN THIS CASE OCCURRED SOME HOURS AFTER THE ARREST DID NOT BRING INTO PLAY THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT

1. The seizure and search of respondents' clothing for evidence of their participation in the offense was plainly reasonable. Respondents were arrested at the scene of the crime and under circumstances which justified the belief that they had attempted to break into the post office. There was, as the court of appeals found, probable cause to believe that an examination of their clothing would lead to the discovery of highly probative evidence. Moreover, the conduct of the law enforcement officers who made the post-arrest seizure of the clothing did not involve any overreaching or use of force or coercion. Respondents were not subject to any personal humiliation either by the locale of the seizure or by its scope. On the contrary, the police officers waited until morning to purchase new clothing before they asked respondents to remove their own clothing.

The fact that the taking of the clothing did not transpire "contemporaneous[ly] with and [was not] confined to the immediate vicinity of the arrest" (Pet. App. A, p. 8a), which the court of appeals found dispositive, is basically irrelevant to the considerations which underlie the post-arrest exception to the Warrant Clause. The holding of the court of appeals was based almost wholly on cases such as *Chimel* v. *California*, 395 U.S. 752, and

---

ment, held that the examination of the weapons constituted an illegal search and seizure because it did not fall within any previously delineated exception to the Warrant Clause.

Coolidge v. *New Hampshire*, 403 U.S. 443, which did not involve post-arrest searches of the person arrested. The holding in *Chimel* regarding the limited scope of a search incident to arrest was made in the context of a situation in which law enforcement officers attempted to justify extensive searches of the defendant's home—including areas on those premises beyond the defendant's immediate reach—as incident to his arrest. The search thus involved an area which the Fourth Amendment intended to protect from warrantless intrusions by law enforcement officers; as the Court noted, a "top-to-bottom search of a man's house" (395 U.S. at 766–767, n. 12) could not be considered a "minor" invasion of his privacy to be tolerated as incidental to his lawful arrest. Similarly, *Coolidge* involved an intrusion onto the defendant's property to seize his automobile (*see* note 4, *supra*).[5]

In those cases, the Court held only that, barring exigent circumstances, a search of a defendant's home incident to arrest must be limited to his person and the areas within his immediate reach (*Chimel*, *supra*, 395 U.S. at 766). As the Court of Appeals for the First Circuit stated in rejecting a claim similar to that raised here (*United States* v. *DeLeo*, 422 F. 2d 487, 492): "We read *Chimel* as being acutely concerned about the increasing legitimation of wide-ranging war-

[5] The present case does not involve a search entailing "intrusion into the human body" (*Schmerber* v. *California*, 384 U.S. 757, 770), where, barring exigent circumstances, the substantial invasion of privacy involved might require a warrant.

rantless searches of lodgings and buildings based on the fortuity of arrest on the premises * * *."[1]

A search of the person, even some time after his arrest, stands on an entirely different footing. It is one thing to say that "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home," *McDonald* v. *United States*, 335 U.S. 451, 456, since, if anything less were required, there would be no rational limits to police intrusion. See *Harris* v. *United States*, 331 U.S. 145, 197 (dissenting opinion of Mr. Justice *Jackson*), quoted approvingly in *Chimel*, *supra*, 395 U.S. at 766, n. 11. It is, however, an entirely different matter to condemn the warrantless seizure of an arrestee's clothing at a time and place (here a jail

---

[1] *Preston* v. *United States*, 376 U.S. 364, on which the court of appeals also relied, involved the warrantless search of an automobile, without probable cause, some five hours after the arrest of the defendants. In holding that the search of the vehicle was unjustified, the Court stated (376 U.S. at 367):

"Once an accused is under arrest and in custody, then a search [of his automobile] made at another place, without a warrant, is simply not incident to the arrest."

This Court subsequently limited *Preston* to stand only for the proposition that a search and seizure of an automobile made at a place other than where the arrest occurred, *without probable cause*, is an unreasonable search and seizure that cannot be justified as incident to lawful arrest. *Chambers* v. *Maroney*, 399 U.S. 42, 47; see also *Cady* v. *Dombrowski*, No. 72-556, decided June 21, 1973. Where, however, probable cause to search for evidence or contraband exists, then a search of an automobile after an arrest "made at another place, without a warrant" does not violate the Warrant Clause. *Chambers* v. *Maroney*, *supra*, 399 U.S. at 48-52 (see *infra*, pp. 19-21).

house)[4] different from the time and place of probable cause arrest. The deep-rooted policy considerations which necessitate the securing of a search warrant to justify searching a citizen's premises are not present when his right of privacy has already been lawfully restricted by virtue of his arrest, and he is in custody.

This distinction was aptly drawn by the Court of Appeals for the Ninth Circuit in *Charles* v. *United States*, 278 F. 2d 386, certiorari denied, 364 U.S. 831. There, after observing that the arrest of a person cannot justify a search of his entire home for evidence unrelated to the crime for which he was arrested ("the fact of arrest does not justify [such] impairment of the right to privacy"), the court held that a contrary rule was applicable to searches of the person (278 F. 2d at 388–389):

> [I]t seems to us that a search of the person of the accused, even for the purpose of uncovering evidence of a crime other than that which is charged, is generally incident to a valid arrest. Power over the body of the accused is the essence of his arrest; the two cannot be separated. To say that the police may curtail the liberty of the accused but [must] refrain from impinging upon the sanctity of his pockets except for enumerated reasons is to ignore the custodial duties which devolve upon arresting authorities. Custody must of necessity be as-

[4] In *Lanza* v. *New York*, 370 U.S. 139, 143, this Court rejected the suggestion "that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects * * *."

> serted initially over whatever the arrested party has in his possession at the time of apprehension. Once the body of the accused is validly subjected to the physical dominion of the law, inspections of his person, regardless of purpose, cannot be deemed unlawful, see *People* v. *Chiagles*, 1928, 237 N.Y. 193, 142 N.E. 583, 32 A.L.R. 670, unless they violate the dictates of reason either because of their number or their manner of perpetration."

The searches of respondents here did not, merely because of the passage of several hours from the time of their arrest, "violate the dictates of reason either because of their number or their manner of perpetration."

2. Although, as the court of appeals found, the law enforcement officers here had no reason to believe that respondents were aware of the damaging evidence on their clothing or that this evidence would be destroyed if time were taken to obtain a warrant, this fact alone

---

[1] "While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." *United States* v. *DeLeo*, 422 F. 2d 487, 493 (C.A. 1), certiorari denied, 397 U.S. 1037; Accord: *United States* v. *Caruso*, 358 F. 2d 184 (C.A. 2), certiorari denied, 385 U.S. 862; *United States* v. *Gonsales-Perez*, 426 F. 2d 1283 (C.A. 5); *United States* v. *Manarr*, 454 F. 2d 542 (C.A. 7); *Rodgers* v. *United States*, 362 F. 2d 558 (C.A. 8), certiorari denied, 385 U.S. 993; *Cotton* v. *United States*, 371 F. 2d 385 (C.A. 9); *Malone* v. *Crouse*, 380 F. 2d 741 (C.A. 10), certiorari denied, 390 U.S. 965; *Shelton* v. *United States*, 404 F. 2d 1292 (C.A. D.C.). Cf. *Abel* v. *United States*, 362 U.S. 217, 239.

does not require the conclusion that a warrant must have been obtained.

The historic basis for the post-arrest exception to the Warrant Clause, as we have shown, does not rest principally on feared destruction of evidence, although that is certainly one consideration (Chimel v. California, supra, 395 U.S. at 764), but on the presence of various factors which were thought to eliminate the necessity for the important protections which the warrant procedure affords.

We submit, however, that even if this "exigent" circumstance—the feared destruction of evidence—is held to be the exclusive basis for the exception justifying "a relatively extensive exploration of the person" without a warrant contemporaneously with an arrest, such a search may nevertheless be undertaken at a later time, provided law enforcement officers have some reason to believe that the search will yield evidence of the individual's complicity in the offense.

Particularly apposite here are the cases involving the exception to the Warrant Clause for automobile searches. The basic justification for such searches turns on the mobility of the vehicle and the ease with which it may be "moved out of the locality or jurisdiction in which the warrant [is] sought." Carroll v. United States, 267 U.S. 132, 153. As the Court stated in Chambers v. Maroney, 399 U.S. 42, 51, "exigent circumstances" justify the warrantless search of "an automobile stopped on the highway" where there is probable cause, because the car is "movable, the occupants are alerted, and the car's contents may never

*be found again if a warrant must be obtained. * * * [T]he opportunity to search is fleeting * * *."*

But the Court in Chambers recognized that, where a vehicle could have been stopped and searched on the highway without a warrant, a search of the vehicle "made at another place, without a warrant," even though exigent circumstances are no longer present, does not violate the Warrant Clause. As the Court explained in Coolidge v. New Hampshire, supra, 403 U.S. *at 463, n. 20 (emphasis in original):*

> *The rationale of Chambers is that given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question whether an initial intrusion is justified.*

In the present case, like Chambers and unlike Coolidge, there was a justified initial intrusion—the arrest of the respondents based upon probable cause. If, as is conceded, their clothing could have been taken at that time without a warrant, then it is submitted that there is "little difference" between such a seizure, and a "later search [and seizure] at the station."

C. THE DECISION BELOW DEPRIVES RATHER THAN FOSTERS FOURTH AMENDMENT VALUES

We have shown that the Warrant Clause was not intended to apply to post-arrest searches of a defendant and that, under the holdings of this Court, its application here is inappropriate. There are additional considerations of policy, moreover, which support such a construction of the Fourth Amendment.

As this Court observed in *Terry* v. *Ohio*, 392 U.S. 1, 12:

> Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. See *Weeks* v. *United States*, 232 U.S. 383, 391–393 (1914). Thus its major thrust is a deterrent one, see *Linkletter* v. *Walker*, 381 U.S. 618, 629–635 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words."

In the context of post-arrest searches, extension of the Warrant Clause and the exclusionary rule to searches and seizures which do not take place "contemporaneous[ly] with and [are not] confined to the immediate vicinity of the arrest" (Pet. App. A, p. 8a) will likely have the effect of deterring reasonable police conduct and encouraging unnecessary intrusion into privacy. This is so because a "relatively extensive" search for evidence "contemporaneous" with an arrest, as we have shown, need not be accompanied by a warrant or be justified by a showing of probable cause, beyond the showing necessary to justify the arrest. A search pursuant to a warrant, on the other hand, requires an express showing of probable cause to believe that evidence described in the warrant will be found.

Because of this, we believe that a holding extending the Warrant Clause to post-arrest searches which

do not take place contemporaneously with the arrest will not encourage law enforcement officers to obtain warrants; rather it will only encourage more extensive "contemporaneous" searches and seizures. This consideration was recognized by the Court of Appeals for the Second Circuit in United States v. Caruso, 358 F. 2d 184, 185–186, in rejecting a claim similar to that raised here:

> *The appellant's contention means that the seizure of his clothing could have been made constitutionally only if, immediately on his arrest, he had been stripped to the buff on the public highway. Even though that April 13th may have been a very pleasant spring day, we are of the opinion that the argument is somewhat extreme.*

Similarly, in the instant case, the cause of a substantial portion of the ten-hour delay between arrest and search resulted from the fact that the law enforcement officers of Lebanon, Ohio, waited until morning to purchase a new set of clothes for respondents. The construction of the Warrant Clause adopted by the court of appeals can only have the effect of discouraging such reasonable police behavior.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
EDWARD H. KORMAN,
Assistant to the Solicitor General.
JEROME M. FEIT,
VICTOR D. STONE,
Attorneys.

NOVEMBER 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

THOMAS R. SMITH
Attorney for Respondent
500 Provident Bk. Bldg.
632 Vine St.
Cincinnati, Ohio 45202

Washington, D.C. ● BYLN PUBLISHERS ● LAW PRINTING CO. ● (202) 393-0625

INDEX

	Page
Questions presented	1
Counter-Statement	1
Summary of Argument	3
Argument:	
The Fourth Amendment requires that a warrant be obtained to seize and search the clothing of a citizen lawfully in custody where the search is neither incident to arrest nor made under exigent circumstances	4
A. The search herein questioned was not conducted incident to arrest.	4
B. The search here in question was not made under exigent circumstances excusing the obtaining of a warrant	6
C. To reverse the decision below would not only seriously diminish Fourth Amendment values but would do so with no compensating benefit to effective law enforcement	7
Conclusion	11

CITATIONS

Cases:

Agnello v. United States, 269 U.S. 20	4, 7
Boyd v. United States, 116 U.S. 616	7
Brett v. United States, 412 F.2d 401 C.A. 5 (1969)	5
Carroll v. United States, 267 U.S. 132 (1925)	6
Chambers v. Maroney, 399 U.S. 42	6
Chimel v. California, 395 U.S. 752	4, 7, 8, 9, 11

	Page
Coolidge v. New Hampshire, 403 U.S. 443	4
Harris v. United States, 331 U.S. 145	7, 8
James v. Louisiana, 382 U.S. 36	4
Katz v. United States, 389 U.S. 347	4
Marron v. United States, 275 U.S. 192	7, 8
McDonald v. United States, 335 U.S. 451	4, 10
Preston v. United States, 376 U.S. 364	4
Stoner v. California, 376 U.S. 483	4
Terry v. Ohio, 392 U.S. 1	4
Trupiano v. United States, 334 U.S. 145	7
United States v. Rabinowitz, 339 U.S. 56	7, 8
United States v. Robinson, No. 72-936 decided December 11, 1973	7, 8, 11
Warden v. Hayden, 387 U.S. 294	4, 6
Weeks v. United States, 232 U.S. 383	7
APPENDIX	1a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-88

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Whether the Fourth Amendment requires that a search warrant be obtained to seize the clothing of a person arrested on probable cause where such seizure takes place ten hours after the arrest, where no probable cause existed to seize the clothing at the time of arrest and confinement and where the purpose of the seizure is to submit the clothing to laboratory analysis in an effort to discover evidence of a crime.

COUNTER-STATEMENT

Respondent William Livesay died November 26, 1973 at Dayton, Ohio. A certified copy of the death certificate is furnished herewith.

In May 1970, the Lebanon, Ohio post office was equipped with a sound activated silent alarm system which, when triggered, set off an alarm in the home of a private citizen who then informed the Lebanon police department by telephone of the activation (R. 210, 212, 308, 309).

At about 11:00 P. M. on May 30, 1970, patrolman Thomas Ashley of the Lebanon police department, while on routine patrol, exited from a driveway immediately south of the post office onto South Broadway (R. 154). As he did so, he saw to his left the respondent Edwards and a companion on the west sidewalk of Broadway at a point approximately even with the eastward extension of the north line of the post office (R. 154, 155). The men were walking northwardly in a normal and unsuspicious manner (R. 158). Upon reaching the intersection of Broadway and Main Streets (approximately half a block north of the post office), they crossed Main Street and turned west on its north sidewalk (R. 158-160).

When Edwards had reached a point approximately half a block west of the intersection, Ashley received a general radio transmission advising that the post office alarm had been activated (R. 160, 161). He immediately apprehended Edwards and his companion (R. 162-164), placed them in his cruiser and returned to the post office from where they were shortly transported to the local jail (A. 13, 18, 28, 32).

As the Statement of the government indicates, police investigation at the post office subsequent to the arrest revealed that an apparent attempt had been made to enter the building through a first floor window.

After the opening of retail stores on the following morning, substitute clothing was purchased for Edwards and his clothing taken from him. Analysis of paint chips

found in his clothing showed them to be substantially similar to paint chips from the vicinity of the damaged post office window.

For the purposes of this appeal we submit that the significant facts are:

1. When patrolman Ashley arrested Edwards he did not know that in fact a crime had been committed, much less the manner or method of it. (Five of the prior six activations of the alarm system had been caused by thunder storms, slamming doors and the like [R. 321]).

2. At the time Edwards was placed in jail and the incarceration process completed, the Lebanon police did not know that access to the post office had been attempted through the window from which paint samples were ultimately obtained.

3. A minimum of ten hours elapsed from Edwards' arrest to the seizure of his clothing.

SUMMARY OF ARGUMENT

This Court has never held or suggested that the rather simple and direct language of the Warrant Clause has no application to the person or effects of a citizen in police custody other than in narrowly circumscribed and carefully delineated circumstances, i.e. searches incident to arrest and searches made under exigent circumstances. The search here in question does not qualify under standards heretofore pronounced by this Court for inclusion in either of the above exceptions to the warrant rule and therefore under existing authority must fail.

Nor is there anything in the legislative history of the Fourth Amendment or in its interpretations by this Court to justify in principle or in practice the substantial reduction in a citizen's rights to privacy and property that the government here advocates.

ARGUMENT

THE FOURTH AMENDMENT REQUIRES THAT A WARRANT BE OBTAINED TO SEIZE AND SEARCH THE CLOTHING OF A CITIZEN LAWFULLY IN CUSTODY WHERE THE SEARCH IS NEITHER INCIDENT TO ARREST NOR MADE UNDER EXIGENT CIRCUMSTANCES.

It is clear that warrantless searches are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.[1] Because the government apparently recognizes that the instant search does not come within either of the aforesaid exceptions to the warrant rule, it asks this Court to create out of whole cloth another exception to the rule. It is well, nonetheless, to examine the instant facts against the standard of existing authority.

A. The Search Herein Questioned Was Not Conducted Incident to Arrest.

No citation is required for the propriety of warrantless searches incident to arrest. What is significant here, however, is that this Court has uniformly interpreted "incident to arrest" to mean "substantially contemporaneous with arrest".[2]

---

[1] Terry v. Ohio 392 U.S. 1; Katz v. United States 389 U.S. 347; Warden v. Hayden 387 U.S. 294; Preston v. United States 376 U.S. 364; Coolidge v. New Hampshire 403 U.S. 443; Chimel v. California 395 U.S. 752; McDonald v. United States 335 U.S. 451; Agnello v. United States 269 U.S. 20.

[2] Agnello v. U.S. 269 U.S. 20; Stoner v. California 376 U.S. 483; James v. Louisiana 382 U.S. 36.

Because the reason for the incident to arrest exception to the warrant rule is rooted in society's interest in protecting the arresting officer from weapons concealed on the person of the arrestee and in preventing the destruction or concealment of evidence or contraband, it can plainly have no application here.

Respondent was arrested at 11:00 P. M., presumably searched for weapons, placed in a police vehicle, transported to the county jail and put alone in a cell. Assuming that retail stores open at 9:00 A. M. and assuming further that the substitute clothing was purchased immediately thereafter, an absolute minimum of ten hours elapsed between arrest and the seizure of clothing during almost all of which time respondent was alone in a jail cell.

A review of the cases cited by the government on this issue, particularly those contained in Footnote 9, reveals that in each instance the facts of those cases brought them within the incident to arrest exception (none approached a ten hour time differential) and, more significantly, that the courts decided them in the context of the incident to arrest exception. None suggested the blanket dispensation from the warrant requirement urged by the government.

Circuit Courts of Appeal have had no apparent difficulty in applying the incident to arrest standards as announced by this Court. In United States v. Williams, 416 F.2d 4 C.A. 5 (1969), the court approved the seizure of clothing two and one half hours after arrest when the seizure took place as part of the initial interrogation and booking process as a search incident to arrest. The same court in the same year condemned the warrantless search of clothing three days after arrest as not meeting the substantially contemporaneous test. Brett v. United States, 412 F.2d 401 C.A. 5 (1969).

Additionally, the instant search was not aimed at preserving evidence or preventing its destruction. As the government concedes in its brief, neither respondent nor police could have been aware of the presence of paint chips because of their microscopic size. This was an investigative search to determine if the evidence existed at all.

For the foregoing reasons we submit that the instant search was not a search incident to arrest.

II. The Search Here in Question Was Not Made Under Exigent Circumstances Excusing the Obtaining of a Warrant.

The most commonly recognized "exigent circumstances" exceptions to the warrant rule have been in the areas of hot pursuit and automobiles capable of movement. *Warden v. Hayden*, 387 U.S. 294 (1961); *Carroll v. United States*, 267 U.S. 132 (1925).

The government argues analogously, citing *Carroll* and *Chambers v. Maroney*, 399 U.S. 42, that if there is probable cause to search an automobile when it is stopped on the highway (*Carroll*) and if it is not unreasonable to move it to another place and there search it (*Chambers*), it is similarly not unreasonable to search the clothing of an arrested citizen at the police station if there was probable cause to search the clothing at the time and scene of arrest.

We recognize and admire the legal logic of that argument but the instant facts destroy utterly its application here. The validity of the argument is premised on the existence of probable cause to search the car or clothing at the time of arrest. Such probable cause simply did not exist at the time of Edwards' arrest and subsequent incarceration. The only facts available to

Patrolman Ashley at the time he arrested Edwards were that the alarm had been activated at the post office and that Edwards had been on the sidewalk at the post office a relatively short time prior to Ashley's being advised of the alarm's activation. He had absolutely no information how access had been attempted or, in fact, if it had been attempted at all. Much less did he know anything about mesh screens or paint chips. It is conceded in the government's Statement that the investigation that revealed the attempt to enter through the window was not made until sometime after Edwards was arrested and jailed.

Absent probable cause to do so, patrolman Ashley could not have separated respondent from his clothing at the arrest scene and if he couldn't do it there, he couldn't do it at the police station immediately upon arriving there.

When, at a later hour, sufficient facts came to the knowledge of the police to justify a seizure of respondent's clothing, there were no longer exigent circumstances existing to excuse the obtaining of a warrant.

C. To Reverse the Decision Below Would Not Only Seriously Diminish Fourth Amendment Values But Would Do So With No Compensating Benefit to Effective Law Enforcement.

This Court's most recent and thorough review in *United States v. Robinson*, No. 72-936 decided December 11, 1973 of the variations on the Fourth Amendment theme from *Boyd* and *Weeks* through *Agnello*, *Marron*, *Lefkowitz*, *Harris*, *Trupiano*, *Rabinowitz* and ultimately to *Chimel*[3] (with respect to the permissible area of search

[3] *Agnello v. U.S.*, 269 U.S. 20; *Weeks v. United States* 232 U.S. 383; *Boyd v. United States* 116 U.S. 616; *United States v.*

beyond the body of the arrestee) and *Robinson*, *supra*, (with respect to the kind of search that may be made of the arrestee's body) make a similar review here unnecessary.

Suffice it to say that we espouse and urge upon the Court the historical and philosophical concepts of the Fourth Amendment expressed by Justice Frankfurter in his dissent in *Rabinowitz* in large part adopted by this Court in *Chimel*. What Justice Frankfurter so bitterly opposed is precisely what the government urges here. As he said at page 79, 80:

> ". . . The right to search an arrested person and to take the stuff on top of the desk at which he sits has a justification of necessity which does not eat away the great principle of the Fourth Amendment. But to assume that this exception of a search incidental to arrest permits a freehanded search without warrant is to subvert the purpose of the Fourth Amendment by making the exception displace the principle. History and the policy which it represents alike admonish against it. . . .
>
> "To tear 'unreasonable' from the context and history and purpose of the Fourth Amendment in applying the narrow exception of search as an incident to an arrest is to disregard *the* reason to which reference must be made when a question arises under the Fourth Amendment. It is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest. The test by which searches and seizures must

---

Lefkowitz 285 U.S. 452; Trupiano v. United States 331 U.S. 145; United States v. Rabinowitz 339 U.S. 56; Chimel v. California 395 U.S. 752; Marron v. United States 275 U.S. 192; Harris v. United States 331 U.S. 145

be judged is whether conduct is consonant with the main aim of the Fourth Amendment. The main aim of the Fourth Amendment is against invasion of the right of privacy as to one's effects and papers without regard to the result of such invasion. The purpose of the Fourth Amendment was to assure that the existence of probable cause as the legal basis for making a search was to be determined by a judicial officer before arrest and not after, subject only to what is necessarily to be excepted from such requirement. The exceptions cannot be enthroned into the rule. The justification for intrusion into a man's privacy was to be determined by a magistrate uninfluenced by what may turn out to be a successful search for papers, the desire to search for which might be the very reason for the Fourth Amendment's prohibition. The framers did not regard judicial authorization as a formal requirement for a piece of paper. They deemed a man's belongings part of his personality and his life."

In *Chimel*, this Court decided that it was unreasonable to search a man's house simply because he is arrested in it. We submit that it is no less unreasonable to strip him of his clothing simply because he is arrested in them.

The government suggests that the only standard by which post arrest, probable cause searches ought be judged is that of reasonableness. We suggest that the adoption of that position may well create more problems than it would solve. If a citizen is arrested three days after an alleged offence, may whatever clothing he happens to be wearing at the time be subjected to the same treatment as respondent's? Is there any time period whatever within which such a search must be conducted? What if the process to which the clothing is to be submitted may damage or destroy it?

Ultimately of course the issue is who will pass upon the mixed questions of reasonableness and probable cause. Is the balance between a citizen's property rights and his clothing and society's interest in obtaining evidence to be determined by the police officer in charge of the investigation or is it to be determined by a disinterested magistrate? As this Court said in *McDonald v. United States*, 335 U.S. 451, 455:

> "... We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

Effective law enforcement could in no way have been benefited by a dispensation from the warrant requirement in the instant case. As we have pointed out previously, neither the police nor respondent were aware of paint chips in respondent's clothing. The police did, in fact, obtain a warrant on the following morning for the

search of the automobile in which the deceased respondent Livesay was arrested and there is no apparent reason why they could not at the same time have obtained a warrant for respondent's clothing.

We submit that in *Chimel* and in *Robinson* this Court has fixed reasonable and ascertainable limits to searches incident to arrest which adequately protect the rights of citizens and which adequately serve the legitimate interests of society. To do other than affirm the decision below would be to unreasonably diminish the first of those considerations without materially enhancing the second.

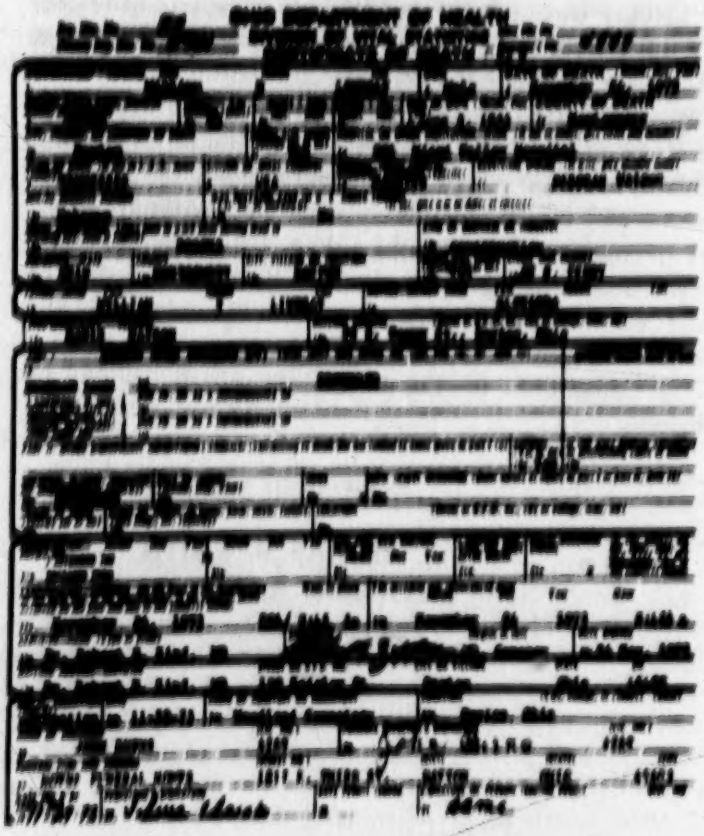
The judgments of the court of appeals should be affirmed.

Respectfully submitted,

THOMAS R. SMITH
Attorney for Respondent

December 1973.

APPENDIX



I HEREBY CERTIFY THE ABOVE TO BE A TRUE AND CORRECT PHOTOGRAPHIC REPRODUCTION OF THE CERTIFICATE ON FILE IN THE OFFICE OF THE HERKIMER COUNTY GENERAL HEALTH DISTRICT, HERKIMER, OHIO.

Dec 19, 1973

DATE

2H

AFFIDAVIT
CORRECTION OF DEATH CERTIFICATE

State of Ohio ss
County of Montgomery

Registrar's No. [illegible]
File No.

INFORMATION AS IT APPEARS ON ORIGINAL CERTIFICATE OF DEATH

Name as recorded: William R. Livesay

Date of Death: Nov. [illegible], 1973 Place of death: Dayton (City or Village) Montgomery (County)

ITEMS TO BE CORRECTED OR ADDED

Item	Reads as	Should read
Date of Cremation	November [illegible], 1973	December [illegible], 1973

PERSON SWEARING TO THE ABOVE FACTS

I, Dale H. McCowan, being first duly sworn say that I have personal knowledge and the above facts are true and correct.

[illegible] [signature]

Subscribed and sworn to before me: December [illegible], 1973

Signature of NOTARY PUBLIC: [signature] My commission expires: Nov. [illegible], [illegible]

UNITED STATES v. EDWARDS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73-88. Argued January 15, 1974—Decided March 26, 1974

Respondent Edwards was arrested shortly after 11 p. m. on May 31, 1970, and taken to jail. The next morning, a warrantless seizure was made of his clothing and over his objection at his later trial, which resulted in conviction, was used as evidence. The Court of Appeals reversed. Though conceding the legality of the arrest, that probable cause existed for believing that the clothing would reveal incriminating evidence, and that searches and seizures that could be made at the time of arrest may be legally conducted when the accused arrives at the place of detention, the court held that the warrantless seizure of Edwards' clothing "after the administrative process and the mechanics of the arrest [had] come to a halt" was unconstitutional. *Held:* The search and seizure of Edwards' clothing did not violate the Fourth Amendment. Pp. 802–809.

(a) At the time Edwards was placed in his cell, the normal processes incident to arrest and custody had not been completed, and the delay in seizing the clothing was not unreasonable, since at that late hour no substitute clothing was available, and when the next morning the police were able to supply substitute clothing and took Edwards' clothing for laboratory analysis, they did no more than they were entitled to do incident to the usual arrest and incarceration. Pp. 804–805.

(b) Once an accused has been lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of arrest may lawfully be searched and seized without a warrant even after a substantial time lapse between the arrest and later administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. Pp. 805–809.

474 F. 2d 1206, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BREW-

ART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, post, p. 809.

Edward H. Korman argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen,* and *Jerome M. Feit.*

Thomas R. Smith, by appointment of the Court, 414 U. S. 1125, argued the cause and filed a brief for respondents.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The question here is whether the Fourth Amendment should be extended to exclude from evidence certain clothing taken from respondent Edwards while he was in custody at the city jail approximately 10 hours after his arrest.

Shortly after 11 p. m. on May 31, 1970, respondent Edwards was lawfully arrested on the streets of Lebanon, Ohio, and charged with attempting to break into that city's Post Office.† He was taken to the local jail and placed in a cell. Contemporaneously or shortly thereafter, investigation at the scene revealed that the attempted entry had been made through a wooden window which apparently had been pried up with a pry bar, leaving paint chips on the window sill and wire mesh

Frank G. Carrington, Jr., Wayne W. Schmidt, Fred E. Inbau, Glen Murphy, Paul Keller, and *Courtney A. Evans* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as amici curiae urging reversal.

† Respondent's alleged confederate, William T. Livesay, was co-respondent in this case, but died after the petition for certiorari was granted. We therefore vacate the judgment as to him and remand the case to the District Court with directions to dismiss the indictment. *Durham v. United States,* 401 U. S. 481 (1971).

screen. The next morning, trousers and a T-shirt were purchased for Edwards to substitute for the clothing which he had been wearing at the time of and since his arrest. His clothing was then taken from him and held as evidence. Examination of the clothing revealed paint chips matching the samples that had been taken from the window. This evidence and his clothing were received at trial over Edwards' objection that neither the clothing nor the results of its examination were admissible because the warrantless seizure of his clothing was invalid under the Fourth Amendment.

The Court of Appeals reversed. Expressly disagreeing with two other courts of appeals,[1] it held that although the arrest was lawful and probable cause existed to believe that paint chips would be discovered on respondent's clothing, the warrantless seizure of the clothing carried out "after the administrative process and the mechanics of the arrest have come to a halt" was nevertheless unconstitutional under the Fourth Amendment. 474 F. 2d 1206, 1211 (CA6 1973). We granted certiorari, 414 U. S. 818, and now conclude that the Fourth Amendment should not be extended to invalidate the search and seizure in the circumstances of this case.

The prevailing rule under the Fourth Amendment that searches and seizures may not be made without a warrant is subject to various exceptions. One of them permits warrantless searches incident to custodial arrests. *United States* v. *Robinson*, 414 U. S. 218 (1973); *Chimel* v. *California*, 395 U. S. 752, 755 (1969); *Weeks* v. *United States*, 232 U. S. 383, 392 (1914), and has traditionally been justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime

[1] The Court stated that it could not agree with *United States* v. *Williams*, 416 F. 2d 4 (CA5 1969), and *United States* v. *Caruso*, 358 F. 2d 184 (CA2), cert. denied, 385 U. S. 862 (1966).

when a person is taken into official custody and lawfully detained. *United States v. Robinson, supra.*[3]

It is also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention. If need be, *Abel v. United States*, 362 U. S. 217 (1960), settled this question. There the defendant was arrested at his hotel, but the belongings taken with him to the place of detention were searched there. In sustaining the search, the Court noted that a valid search of the property could have been made at the place of arrest and perceived little difference

> "when the accused decides to take the property with him, for the search of it to occur instead at the first place of detention when the accused arrives there, especially as the search of property carried by an accused to the place of detention has additional justifications, similar to those which justify a search of the person of one who is arrested." *Id.*, at 250.

The courts of appeals have followed this same rule, holding that both the person and the property in his immediate possession may be searched at the station house after the arrest has occurred at another place and if evidence of crime is discovered, it may be seized and admitted in evidence.[4] Nor is there any doubt

[3] "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States v. Robinson, supra*, at 235.

[4] *United States v. Manor*, 454 F. 2d 542 (CA7 1971); *United States v. Gonzalez-Perez*, 426 F. 2d 1288 (CA5 1970); *United States v.*

that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial.[4]

Conceding all this, the Court of Appeals in this case nevertheless held that a warrant is required where the search occurs after the administrative mechanics of arrest have been completed and the prisoner is incarcerated. But even on these terms, it seems to us that the normal processes incident to arrest and custody had not been completed when Edwards was placed in his cell on the night of May 31. With or without probable cause, the authorities were entitled at that point not only to search Edwards' clothing but also to take it from him and keep it in official custody. There was testimony that this was the standard practice in this city.[5] The police

---

DeLeo, 422 F. 2d 487 (CA1 1970); *United States* v. *Williams*, *supra*; *United States* v. *Miles*, 418 F. 2d 34 (CA8 1969); *Ray* v. *United States*, 418 F. 2d 1052 (CA8 1969); *Westover* v. *United States*, 394 F. 2d 164 (CA9 1968); *United States* v. *Frankenberry*, 387 F. 2d 337 (CA2 1967); *Rivali* v. *United States*, 383 F. 2d 424 (CA9 1967); *Malone* v. *Crouse*, 380 F. 2d 741 (CA10 1967); *Cotton* v. *United States*, 371 F. 2d 385 (CA9 1967); *Miller* v. *Rklund*, 364 F. 2d 976 (CA9 1966); *Hancock* v. *Nelson*, 363 F. 2d 240 (CA1 1966); *Gallither* v. *United States*, 362 F. 2d 884 (CA8 1966); *Rodgers* v. *United States*, 362 F. 2d 388 (CA8), cert. denied, 385 U. S. 985 (1966); *United States* v. *Caruso*, *supra*; *Whalem* v. *United States*, 120 U. S. App. D. C. 331, 346 F. 2d 812, cert. denied, 382 U. S. 902 (1965); *Grillo* v. *United States*, 336 F. 2d 211 (CA1 1964), cert. denied sub nom. *Gorin* v. *United States*, 379 U. S. 971 (1965); *Robinson* v. *United States*, 120 U. S. App. D. C. 95, 343 F. 2d 804 (1965); *Baskerville* v. *United States*, 337 F. 2d 484 (CA10 1958).

[4] See, e. g., *United States* v. *Caruso*, *supra*; *United States* v. *Williams*, *supra*; *Gallither* v. *United States*, *supra*; *Whalem* v. *United States*, *supra*; *Robinson* v. *United States*, *supra*; *Rivali* v. *United States*, *supra*; *Hancock* v. *Nelson*, *supra*.

[5] App. 6. Historical evidence points to the established and routine custom of permitting a jailer to search the person who is

were also entitled to take from Edwards any evidence of the crime in his immediate possession, including his clothing. And the Court of Appeals acknowledged that contemporaneously with or shortly after the time Edwards went to his cell, the police had probable cause to believe that the articles of clothing he wore were themselves material evidence of the crime for which he had been arrested. 474 F. 2d, at 1210. But it was late at night; no substitute clothing was then available for Edwards to wear, and it would certainly have been unreasonable for the police to have stripped respondent of his clothing and left him exposed in his cell throughout the night. Cf. United States v. Curzon, 358 F. 2d 184, 185–186 (CA2), cert. denied, 385 U. S. 862 (1966). When the substitutes were purchased the next morning, the clothing he had been wearing at the time of arrest was taken from him and subjected to laboratory analysis. This was no more than taking from respondent the effects in his immediate possession that constituted evidence of crime. This was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention. The police did no more on June 1 than they were entitled to do incident to the usual custodial arrest and incarceration.

being processed for confinement under his custody and control. See, e. g., F. Gardner & V. Manton, Principles and Cases of the Law of Arrest, Search, and Seizure 208 (1974); E. Fisher, Search and Seizure 91 (1970). While "[a] rule of practice must not be allowed . . . to prevail over a constitutional right," Gouled v. United States, 255 U. S. 298, 313 (1921), little doubt has ever been expressed about the validity or reasonableness of such searches incident to incarceration. F. Taylor, Two Studies in Constitutional Interpretation 30 (1969).

Other closely related considerations sustain the examination of the clothing in this case. It must be remembered that on both May 31 and June 1 the police had lawful custody of Edwards and necessarily of the clothing he wore. When it became apparent that the articles of clothing were evidence of the crime for which Edwards was being held, the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered. *Chimel* v. *California*, 395 U. S. 752 (1969); *Frazier* v. *Cupp*, 394 U. S. 731 (1969); *Warden* v. *Hayden*, 387 U. S. 294 (1967); *Ker* v. *California*, 374 U. S. 23 (1963) (plurality opinion); *Zap* v. *United States*, 328 U. S. 624 (1946), vacated on other grounds, 330 U. S. 800 (1947). Surely, the clothes could have been brushed down and vacuumed while Edwards had them on in the cell, and it was similarly reasonable to take and examine them as the police did, particularly in view of the existence of probable cause linking the clothes to the crime. Indeed, it is difficult to perceive what is unreasonable about the police examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest.

In *Cooper* v. *California*, 386 U. S. 58 (1967), an accused had been arrested for a narcotics offense and his automobile impounded preparatory to institution of forfeiture proceedings. The car was searched a week later without a warrant and evidence seized that was later introduced at the defendant's criminal trial. The warrantless search and seizure were sustained because they were "closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. . . . It would be unreasonable to hold that the police, having to retain the car in their

custody for such a length of time, had no right, even for their own protection, to search it." *Id.*, at 61–62. It was no answer to say that the police could have obtained a search warrant, for the Court held the test to be, not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable, which it was. *Id.*, at 62. *United States* v. *Caruso*, *supra*, expresses similar views. There, defendant's clothes were not taken until six hours after his arrival at a place of detention. The Court of Appeals properly held that no warrant was required:

> "He and his clothes were constantly in custody from the moment of his arrest, and the inspection of his clothes and the holding of them for use in evidence were, under the circumstances, reasonable and proper." 358 F. 2d, at 185 (citations omitted).

Caruso is typical of most cases in the courts of appeals that have long since concluded that once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the "property room" of the jail, and at a later time searched and taken for use at the subsequent criminal trial.[4] The result is the

[4] See *Krogh* v. *United States*, 382 F. 2d 424 (CA8 1967); *Westover* v. *United States*, 384 F. 2d 104 (CA9 1968); *Baskerville* v. *United States*, 397 F. 2d 484 (CA10 1968). In *Baskerville*, the effects were taken for safekeeping on December 23 but re-examined and taken

same where the property is not physically taken from the defendant until sometime after his incarceration.[8]

In upholding this search and seizure, we do not conclude that the Warrant Clause of the Fourth Amendment is never applicable to postarrest seizures of the effects of an arrestee.[9] But we do think that the Court of Appeals for the First Circuit captured the essence of situations like this when it said in *United States* v. *DeLeo*, 422 F. 2d 487, 493 (1970) (footnote omitted):

> "While the legal arrest of a person should not destroy the privacy of his premises, it does—for at

---

no evidence on January 6. *Brett* v. *United States*, 412 F. 2d 401 (CA5 1969), is *contra*. There the defendant's clothes were taken from him shortly after arrival at the jail, as was the custom, and held in the property room of the jail. Three days later the clothing was searched and incriminating evidence found. A divided panel of the Court of Appeals held the evidence inadmissible for want of a warrant authorizing the search.

[8] *Hancock* v. *Nelson*, 363 F. 2d 249 (CA1 1966); *Malone* v. *Crouse*, 380 F. 2d 741 (CA10 1967); *United States* v. *Caruso*, 358 F. 2d 184 (CA2 1966). In *Hancock*, the defendant was first taken into custody at 12:51 a. m. His clothes were taken at 2 p. m. on the same day, two hours after probable cause to do so eventuated.

[9] Holding the Warrant Clause inapplicable in the circumstances present here does not leave law enforcement officials subject to no restraints. This type of police conduct "must [still] be tested by the Fourth Amendment's general prescription against unreasonable searches and seizures." *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968). But the Court of Appeals here conceded that probable cause existed for the search and seizure of respondent's clothing, and respondent complains only that a warrant should have been secured. We thus have no occasion to express a view concerning those circumstances surrounding custodial searches incident to incarceration which might "violate the dictates of reason either because of their number or their manner of perpetration." *Charles* v. *United States*, 278 F. 2d 386, 389 (CA9), cert. denied, 364 U. S. 831 (1960). Cf. *Schmerber* v. *California*, 384 U. S. 757 (1966); *Rochin* v. *California*, 342 U. S. 165 (1952).

least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence."

The judgment of the Court of Appeals is reversed.

So ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

The Court says that the question before us "is whether the Fourth Amendment should be extended" to prohibit the warrantless seizure of Edwards' clothing. I think, on the contrary, that the real question in this case is whether the Fourth Amendment is to be ignored. For in my view the judgment of the Court of Appeals can be reversed only by disregarding established Fourth Amendment principles firmly embodied in many previous decisions of this Court.

As the Court has repeatedly emphasized in the past, "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Coolidge* v. *New Hampshire*, 403 U. S. 443, 454–455; *Katz* v. *United States*, 389 U. S. 347, 357. Since it is conceded here that the seizure of Edwards' clothing was not made pursuant to a warrant, the question becomes whether the Government has met its burden of showing that the circumstances of this seizure brought it within one of the "jealously and carefully drawn"[1] exceptions to the warrant requirement.

[1] *Jones* v. *United States*, 357 U. S. 493, 499.

The Court finds a warrant unnecessary in this case because of the custodial arrest of the respondent. It is of course well settled that the Fourth Amendment permits a warrantless search or seizure incident to a constitutionally valid custodial arrest. *United States* v. *Robinson*, 414 U. S. 218; *Chimel* v. *California*, 395 U. S. 752. But the mere fact of an arrest does not allow the police to engage in warrantless searches of unlimited geographic or temporal scope. Rather, the search must be spatially limited to the person of the arrestee and the area within his reach, *Chimel* v. *California*, *supra*, and must, as to time, be "substantially contemporaneous with the arrest," *Stoner* v. *California*, 376 U. S. 483, 486; *Preston* v. *United States*, 376 U. S. 364, 367–368.

Under the facts of this case, I am unable to agree with the Court's holding that the search was "incident" to Edwards' custodial arrest. The search here occurred fully 10 hours after he was arrested, at a time when the administrative processing and mechanics of arrest had long since come to an end. His clothes were not seized as part of an "inventory" of a prisoner's effects, nor were they taken pursuant to a routine exchange of civilian clothes for jail garb.[1] And the considerations that typically justify a warrantless search incident to a lawful arrest were wholly absent here. As Mr. Justice

[1] The Government conceded at oral argument that the seizure of the respondent's clothing was not a matter of routine jail procedure, but was undertaken solely for the purpose of searching for the incriminating paint chips.

No contention is made that the warrantless seizure of the clothes was necessitated by the exigencies of maintaining discipline or security within the jail system. There is thus no occasion to consider the legitimacy of warrantless searches or seizures in a penal institution based upon that quite different rationale.

Black stated for a unanimous Court in *Preston v. United States*, 376 U. S., at 367:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest."

Accordingly, I see no justification for dispensing with the warrant requirement here. The police had ample time to seek a warrant, and no exigent circumstances were present to excuse their failure to do so. Unless the exceptions to the warrant requirement are to be "enthroned into the rule," *United States v. Rabinowitz*, 339 U. S. 56, 80 (Frankfurter, J., dissenting), this is precisely the sort of situation where the Fourth Amendment requires a magistrate's prior approval for a search.

The Court says that the relevant question is "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable." *Ante*, at 807. Precisely such a view, however, was explicitly rejected in *Chimel v. California*, *supra*, at 764–766, where the Court characterized the argument as "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests." As

---

[1] No claim is made that the police feared that Edwards either possessed a weapon or was planning to destroy the paint chips on his clothing. Indeed, the Government has not even suggested that he was aware of the presence of the paint chips on his clothing.

they were in *Chimel*, the words of Mr. Justice Frankfurter are again most relevant here:

> "To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an 'unreasonable search' is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response. There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant . . . ." *United States* v. *Rabinowitz*, *supra*, at 83 (dissenting opinion).

The intrusion here was hardly a shocking one, and it cannot be said that the police acted in bad faith. The Fourth Amendment, however, was not designed to apply only to situations where the intrusion is massive and the violation of privacy shockingly flagrant. Rather, as the Court's classic admonition in *Boyd* v. *United States*, 116 U. S. 616, 635, put the matter:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right,

as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Because I believe that the Court today unjustifiably departs from well-settled constitutional principles, I respectfully dissent.